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Supreme Court of the United States

OCTOBER TERM, 1945

No. [redacted] 129

COLUMBIA GAS & ELECTRIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, BEN WILLIAMSON, JR., Trustee of Inland Gas Corporation, RUSSELL VAN HORN, et al., as a committee for Bondholders, and MORRIS GREEN,
Respondents.

No. [redacted] 130

COLUMBIA GAS & ELECTRIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, BEN WILLIAMSON, JR., Trustee of Kentucky Fuel Gas Corporation, and MORRIS GREEN,
Respondents.

No. [redacted] 131

COLUMBIA GAS & ELECTRIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, CLINTON M. HARBISON, Trustee for American Fuel and Power Company, et al., and LOUIS A. GREEN, and ROBERT HEILBRUNN, as a committee for Note Holders,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT

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May 29, 1946

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COLUMBIA GAS & ELECTRIC CORPORATION, *Petitioner,* v. UNITED STATES OF AMERICA, BEN WILLIAMSON, JR., Trustee of Inland Gas Corporation, RUSSELL VAN HORN, et al., as a committee for Bondholders, and MORRIS GREEN, *Respondents.*	No. .....
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Columbia Gas & Electric Corporation, a Delaware corporation, respectfully prays that a writ of certiorari issue to review the orders, judgments and decrees of the United States Circuit Court of Appeals for the Sixth

Circuit, entered in the above causes, October 9, 1945, (vol. 9, pp. 1-2)[1] as amended by order of said Circuit Court of Appeals entered November 26, 1945, (vol. 9, p. 46), amending and affirming, as amended, a judgment of the United States District Court for the Eastern District of Kentucky, filed October 30, 1943 (vol. 1, p. 604-5). As thus finally amended the effect of the order of the Circuit Court of Appeals was to require that the claims of the petitioner against three debtor corporations, filed in three Chapter X bankruptcy reorganization proceedings before said District Court, be subordinated "to the claims of all other creditors of every class". Your petitioner seasonably filed with said United States Circuit Court of Appeals its petition for rehearing and modification of said judgments, as amended, and said petition was received and considered by said Court and denied by order entered January 21, 1946. On April 12, 1946, an order was granted by Honorable Harlan F. Stone extending the time for filing the petition for writ of certiorari to June 1, 1946.

A certified transcript of the record is furnished herewith in accordance with Rule 38, Par. 1, of the Rules of this Court.

SUMMARY STATEMENT

(1) Issues Presented.

The petition presents a single question of law, believed to be of unusual public importance in the administration both of the Bankruptcy Laws and of the Anti-Trust Laws, and not heretofore considered by this Court, viz:

Whether in bankruptcy proceedings a creditor who has paid fair value shall, upon a finding that in acquir-

[1]Record references appear in parentheses.

ing the credit he violated the anti-trust laws, be subordinated to other creditors?

In these cases the petitioner had purchased, in the early months of 1930, on the open market, First Mortgage Bonds of two operating companies (Inland Gas Corporation and Kentucky Fuel Gas Corporation) of a value of $2,404,800 and had paid the full market price therefor; *subsequently,* on October 30, 1930, it purchased the capital stock of the holding company (American Fuel & Power) which in turn owned most of the shares of the two operating companies; *and thereafter* it purchased $894,100 additional First Mortgage Bonds of the two operating companies and paid the full market price therefor.[2]

The order of which review is sought requires subordination of petitioner's claims to the claims of "all other creditors of every class", thus subordinating petitioner's claims upon First Mortgage Bonds of the operating companies *for which it paid full value,* not only to claims of other creditors of the operating companies, but apparently also to claims of creditors of the holding company which held the operating company stocks.

The case does not fall within the *Deep Rock* doctrine (*Taylor* v. *Standard Gas & Electric Co.,* 306 U. S. 307), since (1) in that case, the claim was not purchased for value, but was created by the claimant itself in its own favor during the period that it owned all of the stock, and was in full control, of the subsidiary and (2) in the *Deep Rock* case, there was a long history of actual injury done by the controlling company to the Deep Rock Company and its

[2]Petitioner also purchased $45,000 of Debentures of the operating companies before October 30 and $672,700 of such Debentures after October 30.

security holders, and in the present case there is no finding of injury.

We submit that the governing principles in this case, overlooked by the Courts below, are:

> *First,* that the bankruptcy court adjudicates private property rights, and that this is not a proceeding for the vindication of the public interest under the anti-trust laws.
>
> *Second,* that in such adjudication, as a Court of Equity, the bankruptcy court recognizes the full rights of a purchaser for value who is bona-fide in the sense that he did no injury to other creditors.

The first point has become law of this very case, by the decision of this Court in *Columbia Gas & Electric Corporation* v. *American Fuel & Power Company,* 322 U. S. 379, in which this Court had dismissed Columbia's earlier appeal upon the ground that the case was not one under the anti-trust laws but was one in bankruptcy. In support of the second point, the fact that no injury was done to other creditors is established by the undisputed findings of fact of the District Court.

(2) History of the Litigation.

With a view to reorganization, the dispute between petitioner and the other creditors was amicably settled in 1940. The settlement was approved by the District Court. One of the creditors, having objected to the settlement appealed; and the burden of the argument favoring the settlement was assumed by counsel[3] for another creditor who, as it happened, had himself taken a large part in

[3]Arthur Logan, Esq. of the Delaware bar.

initiating the attacks upon petitioner. Petitioner was not represented or present in the Circuit Court of Appeals, for it was not a party. The upshot was that, in an opinion by Circuit Judge Hamilton, the Sixth Circuit Court of Appeals reversed the order of the District Court and remanded the causes with an order that

> "all claims or stock interest of the Columbia in the debtors', title to which it acquired in violation of Section 7 of the Clayton Act,[4] * * * be rejected and the Columbia take nothing thereby." (122 F. (2d) 223).

We refrain from commenting upon the language of the opinion, but we *earnestly request* this Court to read that opinion in its entirety before passing upon our present petition for certiorari.

After that opinion had come down, petitioner's counsel pointed out to Judge Hamilton that it had not been present in Court or had a hearing; whereupon he inserted the statement which appears in the opinion, to the effect that petitioner was not bound by the statements in the opinion (122 F. (2d) 223, 228). An extensive trial was then had before District Judge Ford, at the conclusion of which he filed full findings of fact. In lieu of filing independent conclusions of law, he quoted from the opinion of the Circuit Court of Appeals, merely accepting it, as doubtless was his duty, as "applicable and controlling" (vol. 1, p. 601).

The Department of Justice had participated as an intervenor in the proceedings before the District Court.

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[4] *Sic*, although, of course, only the acquisition of stock could be in violation of Section 7 of the Clayton Act.

Thereafter petitioner, uncertain whether that intervention would cause the case ultimately to be construed as one under the anti-trust laws, filed, simultaneously, appeals both to this Court and the Sixth Circuit Court of Appeals. Upon this Court's dismissal of the appeal to it, 322 U. S. 379, *supra*, the appeal to the Sixth Circuit Court of Appeals was heard and resulted in a reaffirmance of the prior decision, but upon an opinion (per Simons, C.J., 151 F. (2d) 461) entirely different in tone and content from the earlier opinion of the same Court per Hamilton, C.J., and which instead of providing that Columbia should "take nothing" by its claims provided that they should be "subordinated".

The Sixth Circuit Court of Appeals entered its order (October 9, 1945):

> "that the decree of the said District Court in this cause be and the same is hereby limited in remedy to the subordination of the Columbia claims and stock interests in each class to the claims and stock interests of others in such class, and so amended, the judgment is, affirmed".

In consequence, Columbia's claims on its First Mortgage Bonds of the operating companies were ranked ahead of the Debenture claims of other creditors of the operating companies and ahead of claims of holding company creditors which might derive through the holding company's ownership of operating company stocks or unsecured indebtedness. Thereupon, representatives of the Debenture holders petitioned for rehearing, and the Circuit Court of Appeals (without waiting for a reply from petitioner) entered an amendatory order (November 26, 1945) that:

> "The decree will be limited in remedy to the subordination of the Columbia claims to the claims of

all other creditors of every class, and as so amended the judgment is affirmed."[5]

After this second occasion of a decision by the learned Court below to the detriment of petitioner without a hearing having been accorded to petitioner, petitioner filed a petition for rehearing. The petition for rehearing was denied on January 21, 1946, in a *per curiam* opinion (153 F. (2d) 101).

(3) Findings of Fact.

(a) Introductory

Judge Ford's findings of fact are detailed and clear. As we have said, they were not amended by the Circuit Court of Appeals, although the Circuit Court of Appeals (notably in its final order of denial of petitioner's petition for rehearing) permitted itself some comment that went beyond the findings. However, as the judgment below was affirmed, the case comes before this Court upon the findings of Judge Ford which in substance and effect have become concurrent findings of two Courts below.

Before commenting upon them, we owe it to this Court to say frankly that, although Judge Ford presided over an extended trial with the greatest fairness, we cannot refrain

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[5]It will be noted that this amendatory order seems no longer to deal at all with stock claims no matter what their ownership. Since no distinction is made between creditor claims against the parent (American Fuel) and its subsidiaries (Inland and Kentucky Fuel) it would seem, in theory at least, that this order subordinates claims of Columbia on bonds secured by first mortgage on the Inland operating properties to claims of creditors of American Fuel whose claims might derive value from American Fuel's stock ownership of the subsidiary companies, thus in effect subordinating first mortgage claims to common stock.

from the view that he was necessarily influenced,—indeed, we are not sure but that it was his judicial duty to be influenced,—by the pre-judgment which had been expressed by the Appellate Court speaking through Judge Hamilton in his own Circuit. We would have liked, therefore, if it were open to us in this Court, to have sought review of the entire record, with a view to asking this Court to determine whether certain of Judge Ford's findings unfavorable to petitioner, should not be reversed. However, mindful of the rule in regard to concurrent judgments of two Courts below, and of the necessary limitations upon this Court's time, we are presenting this petition upon the basis that the findings represent the governing facts of the case.

We respectfully submit that one fact emerges as dominant from these findings: That no injury was done, or damage caused, to the other creditors by Columbia's action.

(b) Summary of the Findings

Inland and Kentucky Fuel were incorporated in 1927, by the same promoters, to acquire natural gas reserves in Eastern Kentucky. The promoters sold mortgage bonds and debentures, but took the entire common stock issues of both companies as their own compensation for services, in addition to a large percentage of the proceeds derived from the sale of the securities (FF 1, 2).[6] In 1928 the same promoters organized American Fuel & Power as a holding company for Inland and Kentucky Fuel, and sold notes of the holding company to the public. It also

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[6]FF refers to the numbered Findings of Fact, which are printed at page 590 of Volume I of the Record. In this Summary the petitioner is called "Columbia".

organized additional subsidiaries to acquire additional gas acreage and to engage in related operations (FF 3).

Columbia had no connection whatsoever with these promoters or this promotion.

Columbia was engaged in the operation of a great interstate enterprise and in the production, transmission, distribution and sale of natural gas in Kentucky, West Virginia, Ohio, Indiana, and other States (FF 4).

There was one vital difference between Columbia's operations and the operations of the "American Fuel & Power System". Columbia served both domestic and industrial consumers and was a public utility subject to the rules and regulations of State Public Utility Commissions as well as of municipal franchises. Columbia was accordingly required "to give preference to domestic consumers over industrial consumers when, by reason of cold weather or other conditions, the supply of natural gas was insufficient for both" (FF 5). The American Fuel System, on the other hand, served only industrial users and was, therefore, in a position to disregard the needs of domestic consumers, was "free from the handicap of municipal franchises and regulation by utility boards and commissions", and consequently "had a substantial competitive advantage over Columbia's subsidiaries" (FF 6). Such competition existed in 1928, 1929 and 1930, and because American Fuel & Power was able to "take away from Columbia" industrial customers, this competition had by the end of 1929 become "serious and threatening" (FF 7).

At the same time Columbia had an actual need for "a large increase" in gas reserves in American Fuel's territory and "considered that the gas acreage held by American Fuel and its subsidiaries would be a desirable adjunct to its (Columbia's) system" (FF 8).

Accordingly, the findings indicate that Columbia had a double motive to acquire the American Fuel & Power properties; first, to eliminate the competitive advantage arising out of their freedom to disregard the public utility regulation, and second, to acquire additional gas reserves for its own system.[7]

Inland and Kentucky Fuel "sustained substantial operating losses in 1928 and 1929." This was "due to their heavy burden of securities and burdensome gas contracts." "They were never able to earn their fixed charges." They were in a "precarious financial position" (FF 9).

This Court's attention is particularly called to these findings, that the First Mortgage bondholders were, at the height of the greatest period of prosperity in the United States, holding bonds of companies which had never earned their fixed charges and which even in "1928 and 1929" were operating at a loss. All of this, it should also be emphasized, was prior to any acquisition by Columbia of any securities of any of the American Fuel companies. Columbia had no part in giving those companies their "heavy burden of securities" or their "burdensome gas contracts", and had nothing to do with the fact that in the peak year of American prosperity they were in "precarious financial condition".

Columbia "acquired knowledge of the precarious financial position" of the American Fuel companies. It ascertained that their bond indentures contained the usual provisions that default could be declared upon failure to

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[7]Summaries and comments by us appear in indented paragraphs. The other paragraphs are close paraphrases of, or actual quotations from, the Findings.

meet interest or sinking fund requirements, upon the request of the holders of 25% in principal amount of the bonds. "Anticipating" that defaults and foreclosure proceedings must be the inevitable "eventuality", Columbia determined "to place itself in a position to force foreclosure and sale of the properties and afford it an opportunity to purchase them at a foreclosure sale". For this purpose it began to purchase bonds in the open market, and by April 1930 had acquired in excess of 25% in principal amount of the bonds of both (FF 9).

> The Court added a finding that Columbia "concealed the fact that it was the purchaser" (FF 9). Perhaps the Court considered that this was somehow a wrong on Columbia's part; and this may have colored the Court's views. But it is of the nature of the securities markets that purchases are made, on securities exchanges, through brokers and agents and, obviously, if a great concern like Columbia had publicized the fact that it was buying bonds in the open market, the only effect would have been to force the price up.

From the beginning of their operation, the American Fuel companies were under the management of the Hope Engineering Company. Its hope was to interest other promoters in building some outlet which would enable the companies to sell their gas. This was "its only hope of survival", for it "recognized the dubious financial condition of American Fuel and its subsidiaries". "'Hope' succeeded in inducing" other public utility promoters (referred to in the findings as the "Syndicate") to undertake "an ambitious plan" to build a gas pipe line right across Ohio from Kentucky to Detroit for sale and distribution of natural

gas to industrial enterprises only. The new promoters were "a prosperous and successful investment trust" and a banking firm "which had financed many gas enterprises throughout the country * * * and enjoyed wide experience in the promotion of such enterprises". The two constituted "a sufficient combination of financial strength and business experience to foreshadow success of the proposed plans and thereby prevent the impending financial collapse of the American Fuel System as anticipated by Columbia" (FF 10).

The Court will bear in mind that this Syndicate and this plan had no direct connection with the American Fuel System or contract with it. To the American Fuel System, its only hope was an indirect one: That this Syndicate might supply it with a customer. Also, it was late in 1929 that Hope first conceived the plan to build a line to Detroit and it was in January, 1930 that the Syndicate was formed. We assume that the Court will take judicial notice that "ambitious plans" of Wall Street investment trusts and merchant bankers were not then of a quality to lay firm foundations for future prosperity for mortgage bondholders of corporations already over-capitalized and failing to earn fixed charges.

The Syndicate acquired control of American Fuel. But independently, and not through American Fuel, it applied for a franchise to lay gas pipes in Detroit, entered upon a vigorous campaign to secure contracts from industrial consumers, surveyed and acquired a right of way, permits for river crossings, etc. The only physical act that it did was that it "started" the preliminary work preparatory to laying

pipes under the Ohio River. Its plan was eventually "to provide the money necessary" by a sale "to the public" of "a bond issue sufficient to finance completion." Toward that end, a favorable opinion was obtained from one "nationally known and highly reputable natural gas engineer" (FF 10).

> It will be recalled that the "false recovery" from the stock market crash of October 1929 had run its course by June 1930, after which the market continually declined for two full years during the deepening of the great depression. It was at this moment, as the District Court finds, that the hope of these companies lay only in a possible sale to the public of a bond issue "ambitiously planned" by promoters who had only plans, surveys and the "start" of one river crossing to offer as a basis for investment.

At the same time Columbia was making plans to supply natural gas to the Detroit area and was also surveying the Detroit market. Columbia did not need to run a line all the way from Kentucky, relying only on industrial consumers; it needed only to extend its lines from Toledo to Detroit (FF 11). Columbia's plans for a public utility subject to public utility regulation were "seriously threatened" by the Syndicate plans (FF 12).

> FF 12 also describes a third plan for building a pipe line from the Texas Panhandle and the Hugoton Gas fields of Kansas which threatened competition with Columbia, and a fourth plan by the United Carbon Company to build a natural gas pipe line to Cincinnati. FF 12 goes on to explain how Columbia bought out these two threatening enterprises. The purpose of the finding is

evidently to sustain the position that Columbia was seeking to eliminate competition in the area. But these facts need not here be considered in detail, as we are presenting our petition on the basis of the District Court's findings that one of the motives of Columbia at that time was to eliminate this sort of competition. It is precisely because this involved a collision with the anti-trust laws that the question arises in this case.

Through its open market operations Columbia had acquired by October 30, 1930, approximately 42% of the outstanding bonds and debentures of Kentucky Fuel and approximately 36% of the outstanding bonds and debentures of Inland, *representing an aggregate expenditure by Columbia of between three and four million dollars* (FF 12).

It was on October 30, 1930, that Columbia contracted to pay to the Syndicate $2,826,789.28 for the Syndicate's entire holdings in the American Fuel System and all related corporations. This was a profit to the Syndicate of $350,000. Columbia also provided additional profit to the Hope Engineering Corporation. All of the Syndicate directors having proffered their resignations, Columbia thereupon "promptly" precipitated receivership proceedings against Inland and Kentucky Fuel and caused their existing President (not a Columbia man) one W. E. Lockhart to be appointed Receiver (FF 13).

In other words, there was no material period during which Columbia exercised control. Having purchased the shares, it "promptly" precipitated receivership.

Even more important at this point is the fact that FF 13, as originally entered, concluded with the following sentence:

> "For a considerable period, the activities of the receiver of Inland, Kentucky Fuel and also of American Fuel and its other subsidiaries, both of whom were nominees of Columbia, were largely dominated by Columbia.";

and that, on reconsideration, the learned District Judge expressly struck this sentence out of the findings (I, 603). The District Court thus expressly excluded from the case any element of continuing wrongful control by Columbia over the receivership proceedings. This finding was based on ample evidence, for the receiver (Mr. Lockhart) was examined and cross-examined at length.

At the time of the negotiations of purchase by Columbia (presumably the Summer and Autumn of 1930), the leader of the Syndicate (Mr. O. R. Seagraves, President of Moody-Seagraves Company) had had his confidence in the project "considerably shaken by reason of the financial depression throughout the country and the depleted financial strength of the members of the Syndicate by reason thereof". The other members of the Syndicate did not "*fully*[8] share the views of Mr. Seagraves" and were principally induced by the large profits that they expected to receive from Columbia (FF 14). In fact, "the Syndicate was encountering unexpected obstacles and difficulties in the promotion of its plans for the Detroit project". It had "not abandoned them". It "was ready, able and willing to continue its *efforts* to develop the project." "Whether it would have ultimately succeeded is a matter which lies entirely in the realm of speculation." (FF 15).

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[8]All italics ours.

The Court will observe the effort of the District Court to maintain an even balance. On the one hand, it recognizes the financial depression, the depleted financial strength of the Syndicate members themselves, the consequent shaken faith of its leader, the unexpected obstacles and difficulties actually encountered in the promotion. On the other hand, there is the caution that the Syndicate members did have another motive in withdrawing, viz. large profits, that although they shared the views of their leader they did not "fully" share them, that they had not actually "abandoned" the project, and that they were still prepared to make an "effort". Finally, the Judge strikes a balance between the two, and leaves us with the ultimate finding that whether the Syndicate would have succeeded is a matter which lies entirely "in the realm of speculation". We respectfully submit that this is the maximum that can be said of the aspirations of this Syndicate at the time in question. And the Court will add the further speculative element that had the Syndicate by some miracle succeeded, it would not have been for the account of Inland and Kentucky Fuel, except that indirectly they might have benefitted by finding an outlet for the gas which they were required to purchase under their "burdensome contracts."

At the same time, viz. prior to the purchase by Columbia of the Syndicate, certain of Columbia's responsible executive officers had said in substance and effect "that it would not lie idly by and permit the construction of a pipe line through the heart of its territory as proposed by the Syndicate". (FF 16).

This is, of course, the finding that Columbia had an intention to eliminate the menace and threat of competition.

There remains the one ultimate finding, which is, in the language of the Anti-Trust Act itself (and therefore not an evidentiary finding) that Columbia "was engaged in a conspiracy, the object, purpose and effect of which was to restrain and monopolize the trade and commerce in natural gas in and between the States of Kentucky, Ohio, West Virginia, Indiana and Michigan"; that the claims "were acquired pursuant to and in accomplishment of the aims and purposes of that conspiracy"; and that the plans of Columbia to acquire the properties themselves as an adjunct to the Columbia System were "merely collateral and incidental to the main purpose of the conspiracy." (FF 17).

Just as the District Court's findings maintained an even balance as to any possibility of the Syndicate realizing its hopes—finding this "entirely in the realm of speculation"—so also the Court maintained something of a balance as to the motives for Columbia's action. It clearly found that two motives existed.

One of the motives was the acquisition of gas reserves for Columbia's Seaboard line. The findings are specific that Columbia was engaged in the construction of the Seaboard line from the Kentucky fields to the cities of Washington, Baltimore and Philadelphia; that this called for "a large increase in Columbia's holdings of gas reserves in West Virginia and Eastern Kentucky"; that Columbia entered upon a "large scale program for increasing its gas acreage in that territory" and that it considered that "the gas acreage held by

American Fuel and its subsidiaries would be a desirable adjunct to its system." (FF 8). The gas acreage of Kentucky Fuel Gas Company alone represented an investment by that Company of $3,000,000 (FF 2).

Secondly, the District Court finds that Columbia was motivated by a desire to purchase freedom from competition. American Fuel's freedom from the handicap of "regulation by utility boards and commissions" gave it a "substantial competitive advantage" and this had become serious and threatening to Columbia (FF 5, 6, and 7). Columbia's plans for the development of its business in the Detroit field were "seriously threatened" by the plans for the American Fuel System (FF 12).

Whatever relative weight one ascribes to the two motives which the District Court so finds as the inducements for Columbia's investment in securities of the American Fuel Systems (and the District Court in its ultimate finding, FF 17, makes the legitimate reason collateral and incidental to that of suppressing competition) this much the findings make clear: (1) Columbia paid large sums to purchase securities for value—in substantial part open market purchases of mortgage bonds —for the acquisition of which there *was* a legitimate business reason; (2) no damage or injury to other holders of securities of American Fuel resulted from this acquisition.

(c) Comment on Findings of Fact.

Nowhere in the findings, either in the evidentiary or in the final conclusory finding, is there any statement that the

other creditors were financially damaged by Columbia's buying in.

The findings show that as of 1930 the other creditors were at the fork of the road. If Columbia had not bought in, they would have entered the great depression as owners of securities in a company that had been over-capitalized, that had burdensome gas contracts, that had earned no profits during the years of prosperity, and whose sole hope of profit lay in the financing by a Wall Street Syndicate during the depression of a bond issue to make real an ambitious plan to sell only to private industrial purchasers after building for the purpose a pipe line across three states. We respectfully submit that it is obvious that under these conditions the value of the bonds would have been entirely wiped out. The alternative road was for Columbia to eliminate the promoters, foreclose the mortgage and effect an orderly liquidation in which the other creditors and itself might fairly share in proportion to their respective investments.

JURISDICTION

Jurisdiction of this Court is invoked under Judicial Code, §240-(a), as amended by the Act of June 7, 1934 (48 Stat. 926, 28 U.S.C. §347-(a)). The date of the judgment of the United States Circuit Court of Appeals for the Sixth Circuit to be reviewed was entered October 9, 1945, as amended by order of said Circuit Court of Appeals entered November 26, 1945. A petition for rehearing and modification of said judgment, as amended, of said Circuit Court of Appeals was denied by said Court by order entered January 21, 1946. On April 12, 1946, an order was granted by

Honorable Harlan F. Stone extending the time for filing the petition for certiorari to June 1, 1946.

QUESTION PRESENTED

Whether in bankruptcy proceedings a creditor who has paid fair value shall, upon a finding that in acquiring the credit he violated the anti-trust laws, be subordinated to other creditors?

Reasons Relied on for the Allowance of the Writ

(1) The case presents an important question in the fields of Federal Bankruptcy and Anti-Trust Law not previously considered by this Court.

(2) The decision of the Court below is in conflict with the decision of this Court in *Hartford Empire Co.* v. *United States,* 323 U.S. 386.

(3) The decision of the Court below is in conflict with the decision of the Eighth Circuit Court of Appeals in *Dunlop* v. *Mercer* (*Re Dunlop*), 156 Fed. 545, where in a bankruptcy case, the Court said, at p. 555:

> "The general rule that an illegal contract is void and unenforceable is, however, not without exception. * * * It is qualified by the exception that where a contract is not evil in itself, and its invalidity is not denounced as a penalty by the express terms of or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the courts to do so, and they will not thus affix an additional penalty not directed by the lawmaking power." (Citing many cases)

(4) The decision of the Court below is in conflict with the very recent decision of the United States District Court for the Southern District of New York in *Standard Oil Company* v. *Markham,* 61 F. Supp. 813 (June 1, 1945).

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati, Ohio, commanding said Court to certify and send up to this Court, on a date to be designated, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this case, to the end that this case may be reviewed and determined by this Court; that the judgments of the Circuit Court of Appeals, as amended, be reversed; and that your petitioner be granted such other and further relief as may seem proper.

COLUMBIA GAS & ELECTRIC CORPORATION,

By WM. DWIGHT WHITNEY,
Attorney for Petitioner,
15 Broad Street,
New York 5, N. Y.

May 29, 1946.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The District Court rendered no opinion, its decision being embodied in Findings of Fact and Conclusions of Law filed September 3, 1943 (vol. 1, p. 590). The opinion of the Circuit Court of Appeals, in the form in which originally rendered on October 9, 1945 (vol. 9, pp. 3-23) was not reported, but as amended by the court's order of November 26, 1945, it has been reported at 151 F. (2d) 470 (vol. 9, p. 46). The opinion of the Circuit Court of Appeals denying the petitions for rehearing (vol. 9, pp. 56-57) has been reported at 153 F. (2d) 101.

ARGUMENT

POINT I

THE JUDGMENT OF THE COURT BELOW WAS ERRONEOUS BECAUSE IT INFLICTED A PENALTY UPON COLUMBIA WHICH IS NOT PRESCRIBED BY THE FEDERAL ANTI-TRUST STATUTES.

The judgment of the Court below is that Columbia's claim against the companies in the American Fuel System be subordinated to those of all other creditors, because it acquired such claims in violation of the Federal Anti-Trust Statutes.

As set forth in the History of the Litigation, this Court in its *per curiam* opinion dismissing the direct appeal of this case (*Columbia Gas & Electric Corporation* v. *American Fuel and Power Company*, 322 U. S. 379, May 22, 1944) made clear that this is not a proceeding to enforce penalties in the public interest, but a bankruptcy proceeding under Chapter X—governed by the considerations

which determine the administration of an estate among private claimants.

The Federal Anti-Trust Statutes prescribe expressly the penalties for their violation. None of these penalties would support the judgment of the Court below subordinating Columbia's claims. Consequently, the Circuit Court's decision conflicts with the decision of this Court in *Hartford Empire Co.* v. *United States,* 323 U. S. 386. There the decree of the District Court had required that the patents of the defendant glass companies, which had been used in contravention of the Anti-Trust Laws, should be thereafter licensed by the defendant companies royalty-free for the life of the patents. This Court held that this requirement constituted a confiscation of the property rights of the glass companies in the patents and went beyond the power given to a court under the Anti-Trust Statutes. The Court said as follows:

> "The Sherman Act provides criminal penalties for its violation, and authorizes the recovery of a penal sum in addition to damages in a civil suit by one injured by violation. It also authorizes an injunction to prevent continuing violations by those acting contrary to its proscriptions. The present suit is in the last named category and we may not impose penalties in the guise of preventing future violations."

This is in accordance with the well established principle (as stated by this Court in *Farmers, etc. National Bank* v. *Dearing,* 91 U. S. 29, 35 (1875)), that:

> "Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes."

This principle was first established with reference to the Anti-Trust Act in the leading case of *Paine Lumber Co.* v. *Neale,* 244 U. S. 459, (1917), which was a suit brought by a private party for an injunction to restrain a violation of the Federal Anti-trust law under Section 4 of the Sherman Act. It was held, in dismissing the suit, that only the Attorney General could bring such a proceeding because he was specified in the Sherman Act as authorized to bring such a proceeding and the specification of him and the lack of specification of a private party made the remedy unavailable to a private plaintiff. This was followed by *Geddes* v. *Anaconda Mining Co.,* 254 U. S. 590 (1921), which was a bill by minority stockholders of one copper company to set aside its sale to another company, on the ground that the sale was for the purpose of restraining trade. It was held that the bill could not be sustained under the Sherman Act, the court saying (p. 593):

> "It is now the settled law that the remedies provided by the Anti-Trust Act of 1890 for enforcing the rights created by it are exclusive and therefore, looking only to that act, a suit, such as we have here, would not now be entertained. *Wilder Manufacturing Co.* v. *Corn Products Refining Co.,* 236 U. S. 165, 174; *Paine Lumber Co.* v. *Neal,* 244 U. S. 459, 471; *United States* v. *Babcock,* 250 U. S. 328, 331."

The case of *Wilder Mfg. Co.* v. *Corn Products Co.,* 236 U. S. 165 (1915), referred to in the foregoing quotation, was a suit by a seller of goods against the buyer to recover the purchase price and the defense was made that the buyer was an illegal combination under the Sherman Act. This defense the Court held to be without merit saying, at page 174:

> "It is true that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute or of the courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a two-fold reason: First, because of the familiar doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.' * * *"

It will be noted that these cases were decided under the Sherman Act as it stood before the passage of the Clayton Act in 1914 which expressly gave a private party the right to enjoin violations of the Anti-Trust Act; however, the principle upon which these decisions were based remains law.

This principle has been often applied, and many times in holding that, although a property owner or creditor may have violated some penal statute in acquiring the property or the debt owing him, he does not forfeit his property or his right to collect the debt, but only the statutory remedy may be enforced against him.

Harris v. *Runnels,* 12 How. (53 U. S.) 79 (1851);

McBroom v. *Scottish Investment Co.,* 153 U. S. 318 (1894);

Yates v. *Jones National Bank,* 206 U. S. 158 (1907);

Fritts v. *Palmer,* 132 U. S. 282 (1889).

In a recent case closely analogous to the case at bar the United States District Court for the Southern District of

New York, following the principle above stated, has held that a party to an illegal combination restraining competition is not deprived of legal protection of his property. *Standard Oil Company* v. *Markham,* 61 F. Supp. 813 (June 1, 1945). In that case Standard Oil and three associated companies brought an action under §9(a) of the Trading With The Enemy Act to recover from the Alien Property Custodian thousands of United States patents and certain shares of stock in various corporations. Plaintiffs alleged that they were the owners of those assets; that they acquired them from I. G. Farbenindustrie; that the Custodian vested these assets in himself, and that plaintiffs were entitled to have those assets returned. The Custodian asserted as a defense to the action that plaintiffs acquired the assets in question by agreements which violated the Anti-Trust laws of the United States. The holding of the Court was that the defense asserted by the Custodian was invalid. Pointing to the ramifications of the Custodian's argument, the Court said:

> "In considering the validity of this defense the first point is to observe the inevitable breadth of the Custodian's contention. If the Custodian is correct in his contention that relief should be denied where the claimed property was acquired in violation of the federal anti-trust laws, it would seem that relief should also be denied where the claimed property was acquired in violation of any other federal law, or any state law, or any foreign law. There is no hierarchy of laws in which the anti-trust laws are given peculiarly high rank. And the anti-trust laws, as the Supreme Court has recently recognized in *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 415, 65 S. Ct. 373, have no provision that patents used in violation of these laws shall be forfeited" (p. 814).

The Court further pointed out that authority as well as logic compelled rejection of the Custodian's contention:

> "The unsoundness of the Custodian's defense under the anti-trust laws is revealed not alone by the breadth of its necessary implications, but by cases such as *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 549-551, 22 S. Ct. 431, 46 L. Ed. 679, and *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 253, 45 S. Ct. 300, 69 L. Ed. 597. These cases hold that where a person engaged in and acting pursuant to a conspiracy to violate the anti-trust laws makes a contract which is not inherently invalid he can enforce that contract against the other party. Similarly, where a person has acquired property by a contract in restraint of trade he can recover the property from a wrongful taker. *California Cured Fruit Ass'n.* v. *Stelling et al.*, 141 Cal. 713, 75 P. 320, 322." (p. 815)

The principle to be derived from controlling authority was stated by the Court in the following language:

> "These authorities illustrate the rule, that a party to a previous illegal contract, agreement or combination with others, restraining competition in that business is not deprived of legal protection of his property in that business. American Law Institute, Restatement of Contracts Sec. 519; Williston, Contracts, Rev. Ed., Sec. 1661. Such a rule embodies the broad principle that while one who has acquired property in violation of law is subject to whatever personal penalties and infirmities of title that law provides, he is not an outlaw and his title to property is not subject to collateral attack. See, *Bowmakers, Ld.*, v. *Barnet Instruments, Ld.* [1945] 1 K. B. 65, 71 (C.A.)." (p. 815)

Distinguishing the principle of the *Morton Salt* case from the case before it the Court said:

> "Although the Custodian places no reliance on *Morton Salt Co.* v. *G. S. Suppiger Co.,* 314 U. S. 488, 62 S. Ct. 402, 86 L. Ed. 363, perhaps a word should be said about its doctrine, particularly since it is in square conflict with the second illustration given for Sec. 519 of the Restatement of Contracts, cited two paragraphs above. As explained in *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 415, 416, 65 S. Ct. 373, the Morton Salt Co. case stands for the proposition that so long as a patent owner is using his patent in violation of the anti-trust laws he cannot restrain infringement of it by others. In the instant case plaintiffs, whatever may have been their past conduct, are not currently using the patents here involved in violation of the anti-trust laws." (p. 815) * * * "Furthermore it would be a bold interpretation which would carry the doctrine of that case beyond giving an infringer a defense against a patentee. It is hard to suppose that the Supreme Court meant to indicate that anyone may without accountability to a patentee take from him a patent he is using in violation of the anti-trust laws. See *Hartford Empire Company* v. *United States,* supra." (p. 815)

The far reaching implications of the principle here at issue is illustrated by the decision in *Standard Oil Company* v. *Markham.* The holding of the Courts below is in direct conflict with the *Standard Oil Company* decision, and it is respectfully submitted that, because of the latter's persuasive argument and adherence to long established rules of law, it is entitled to great respect.

POINT II

THE PENALTY IMPOSED BELOW, IN THE ABSENCE OF INJURY TO THE INTERESTS OF OTHER SECURITY HOLDERS RESULTING FROM COLUMBIA'S PURCHASE OF AMERICAN FUEL SECURITIES, WAS BEYOND THE GENERAL EQUITY POWERS OF THE COURT.

The Circuit Court in its opinion holds that the rule restricting penalties for Anti-Trust infractions to those prescribed by statute is not applicable to the case at bar, because the District Court, sitting as bankruptcy court, "* * * imposed no penalty; it but exercised its equity power to deny relief to a creditor seeking enforcement of contracts entered into illegally or tainted with inequity."

This is to hold in substance and effect that a bankruptcy court has greater power of imposing penalties for infraction of the Anti-Trust laws than have the courts of equity which are entrusted with their enforcement by the statutes themselves. This is in direct conflict with the decision of the Circuit Court of Appeals of the Eighth Circuit in *Dunlop* v. *Mercer (Re Dunlop),* 156 Fed. 545, app. dismissed 212 U. S. 588, a bankruptcy case, where the court's opinion at page 555 reads as follows:

> "The general rule that an illegal contract is void and unenforceable is, however, not without exception. * * * It is qualified by the exception that where a contract is not evil in itself, and its invalidity is not denounced as a penalty by the express terms of or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the courts to do so, and they will not thus affix an additional penalty not directed by the lawmaking power." (Citing many cases.)

The doctrines of *Pepper* v. *Litton*, 308 U. S. 295, and *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307, are not new but stem from principles of equity jurisprudence whose principal example in this country is in the famous *New York Central* case, *Farmers Loan & Trust Company* v. *New York & Northern Railway Company*, 150 N. Y. 410. An understanding of that case requires it to be contrasted with the earlier decision of the same New York Court of Appeals in *Morris* v. *Tuthill*, 72 N. Y. 575, which was expressly approved and reaffirmed in the *New York Central* case, 150 N. Y. at p. 432. In *Morris* v. *Tuthill*, the defendant, actuated by malice toward a mortgagor, had conspired with the mortgagee to acquire the mortgage in order that he might foreclose. Here was an extreme case of the making of an investment in property for a malicious and wrongful purpose. The Court held that that was no ground to deprive the investor of his property right, saying:

> "The motives of the former owner of the mortgages in selling, or of the plaintiffs in buying them, are not material, and the appellant has no concern with the consideration of the assignment. It is sufficient that the mortgage debt is due, and has been transferred to and is now owned by the plaintiff. He may have bought it from motives of malice toward the defendant and solely with a view to sue upon them, and the former owner from a like motive may have transferred them without consideration, but this would not constitute a defense to the action. The appellant can only arrest the action by paying the amount due, or tendering the same and bringing it into court. The facts stated do not constitute an equitable defense to the mortgages, or impeach the plaintiff's title."

This Court cited and quoted at length from *Morris* v. *Tuthill* in its decision of *Dickerman* v. *Northern Trust Company,* 176 U. S. 181, at 190. The decision is thus summarized in the head-note:

> "*Held:* That, while these proceedings were taken by connivance and consent of the parties, they were not collusive in a legal sense, as the debt was honestly due and the plaintiff entitled to the judgment. *Held, also:* That while the judgment was obtained for the obvious purpose of enabling the trustees to declare the mortgage to be due, the court would not inquire into the motives of the parties" (p. 181).

The *Deep Rock* case and the other Supreme Court cases which have applied the doctrine have made clear that the mismanagement, domination or other unlawful conduct must, in order to bring the *Deep Rock* principle into play, have resulted in *injury* to the other securityholders.

The doctrine of the *Deep Rock Oil* case was predicated on the underlying fact that the action of the securityholder whose claims were subordinated had injured the other securityholders. The subordination of the claim of the Standard Gas & Electric Company, which was attempting to assert its claim for advances to the Deep Rock Oil Company, was, according to the description of the *Deep Rock* case in the subsequent case of *Pepper* v. *Litton,* 308 U. S. 295, at 308 "based on the equities of the case—the history of spoliation, mismanagement, and faithless stewardship of the affairs of the subsidiary by Standard *to the detriment of the public investors*". In these words, this Court made it clear that the *Deep Rock Oil* case was decided on facts which showed that the Standard Company's mismanagement had injured the other securityholders. The same language occurred in the *Deep Rock* case itself (306 U. S.

at 322), where the court said that the District Court was required as a court of equity "to recognize the rights and the status of the preferred stockholders arising out of Standard's wrongful *and injurious* conduct in the mismanagement of Deep Rock's affairs"; and it also stated (p. 323) that "Deep Rock finds itself bankrupt not only because of the enormous sums it owes Standard but because of the abuses in management due to the paramount interest of interlocking officers and directors in the preservation of Standard's position, as at once proprietor and creditor of Deep Rock."

Obviously, the history of the case at bar is entirely different from the history in the *Deep Rock* case. The District Court made no specific finding of injury to the American Fuel System or its securityholders resulting from Columbia's acquisition of the American Fuel Securities. In the *Deep Rock* case this Court said with utmost emphasis that Deep Rock's difficulties were due to the long years of mismanagement by Standard Gas and this mismanagement had injured the other securityholders. The opinion is replete with instances of the actual injury that Standard had done to Deep Rock—inadequate initial capitalization (306 U. S. 323), huge rentals charged it year after year for plants that were operated at a loss (p. 319), advances charged it for the payment of improvident dividends (pp. 317, 323), excessive management fees (pp. 319-20), interest on advances at the rate of seven per cent. per annum compounded monthly (p. 320) and other abuses too numerous to mention here.

Nothing of the sort appears in the present record. Columbia did not purchase control of American Fuel until November 6, 1930; and its financial embarrassment had crystallized long before that. Inland and Kentucky Fuel

went into receivership less than a month after the purchase, on December 2, 1930, after which date they were no longer under Columbia management but that of the receiver of the District Court.

The bonds here in question had been issued by the bankrupts to purchasers other than Columbia and had been owned by those who purchased them for years before Columbia bought them. They were valid outstanding claims against the bankrupt companies and when Columbia purchased them it purchased valid claims and held them as its property.

It is respectfully submitted that there is no principle of bankruptcy law which permits that claims valid at their inception and constituting a property right be subordinated in the hands of a purchaser who has obtained them in contravention of the Anti-Trust laws.

Respectfully submitted,

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May 29, 1946

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FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 129

COLUMBIA GAS & ELECTRIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, BEN WILLIAMSON, JR., Trustee of Inland Gas Corporation, RUSSELL VAN HORN, et al., as a committee for Bondholders, and MORRIS GREEN,
Respondents.

No. 130

COLUMBIA GAS & ELECTRIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, BEN WILLIAMSON, JR., Trustee of Kentucky Fuel Gas Corporation, and MORRIS GREEN,
Respondents.

No. 131

COLUMBIA GAS & ELECTRIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, CLINTON M. HARBISON, Trustee for American Fuel and Power Company, et al., and LOUIS A. GREEN, and ROBERT HEILBRUNN, as a committee for Noteholders,
Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR COLUMBIA GAS & ELECTRIC CORPORATION

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IN THE

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Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR COLUMBIA GAS & ELECTRIC CORPORATION

All of the briefs filed in opposition to our petition for certiorari, that is to say, the brief of the Government, the

brief of the Committee representing the Inland Gas Bondholders and the brief of the Committee representing American Fuel and Power Noteholders, go on the theory that the question on which we ask this Court to pass, namely,

> "Whether in bankruptcy proceedings a creditor who has paid fair value shall, upon a finding that in acquiring the credit he violated the anti-trust laws, be subordinated to other creditors?"

is not involved in the case because the Court below decided it on the ground that

> "* * * when a controlling stockholder of a corporation manages its affairs so as to promote, not the interests of the corporation but those of the controlling stockholder, a bankruptcy court will subordinate the claims of the wrongdoer to the claims of creditors and minority stockholders injured by this breach of trust." (Government's brief, pp. 11-12)

This position of our opponents is not borne out either by the record or by the findings of the District Court or by the opinion of the Circuit Court of Appeals below. On the contrary, the record and the findings and the opinion are replete with statements showing that both lower courts did decide that it was just because Columbia Gas & Electric Corporation (hereinafter called Columbia) had violated the Federal anti-trust laws in acquiring the securities in question, that the securities in its hands should be unenforcible in the bankruptcy proceeding.

The very first sentence of the opinion of the Circuit Court of Appeals (Vol. 9, p. 3; 151 Fed. 2d at 462) says that

> "* * * we meet again in these appeals *the basic problem* encountered in In re American Fuel &

> Power Co., 122 F. 2d 223. That case involved appeals by creditors of Kentucky gas corporations in Chapter X, bankruptcy reorganization proceedings from orders authorizing and directing trustees to consummate a proposed settlement of cross-demands between the debtors and the Columbia Gas & Electric Corporation, the present appellant. The orders were attacked *on the ground that the stock interests and securities of the debtors had been acquired by Columbia from the public for purposes condemned by and in violation of § 7 of the Clayton Act, 15 U. S. C. A. § 18.*" (Italics ours)

Here is a straight statement by the Circuit Court of Appeals of the "basic problem" involved, namely, that the issue was the effect of the Federal anti-trust laws on the enforcibility of the Columbia-owned securities.

Next, in reviewing the findings of the District Court the Circuit Court of Appeals (Vol. 9, p. 12) reiterated the finding of the lower court that

> "* * * Columbia, its executive officers, directors and certain of its corporate subsidiaries, were engaged in a conspiracy, the object, purpose and effect of which was to restrain and monopolize trade and commerce in natural gas in and between the states of Kentucky, Ohio, West Virginia, Indiana and Michigan, that the claims presented by and on behalf of Columbia against the debtors, American Fuel, Inland and Kentucky Fuel, were acquired pursuant to and in accomplishment of the aims and purposes of that conspiracy,"

and then went on to say (same page)

> "*Wherefore,* in applying the principles of law announced by this court in the American Fuel and

> Power case, supra, it concluded it to be the duty of the Bankruptcy Court to withhold its aid from parties seeking benefit from an agreement tinged with illegality, and that under the facts of record it was not required to approve the claims or stock interests of Columbia." (Italics ours)

That, again, is a straight statement that the issue was the effect on the Columbia-owned securities of the alleged breach of the Federal anti-trust laws.

These statements of the Circuit Court of Appeals simply follow the decision of the same court in the prior American Fuel & Power Company case (122 Fed. 2d 223) so referred to by it, the concluding paragraph of the opinion in which read that (Vol. I, p. 687)

> "The orders of the lower court are reversed and the causes remanded, with direction to fix the division of creditors and stockholders of the debtors into classes according to the nature of their respective claims and stock and it is further ordered that all claims or stock *interest of the Columbia in the debtors', title to which it acquired in violation of Section 7 of the Clayton Act, 38 Stat. 731, 15 U. S. C. A. § 18, be rejected and the Columbia take nothing thereby.*" (Italics ours)

Likewise the findings of the District Court were all directed to the anti-trust issue rather than to an injury to the creditors. See the findings where the District Court emphasized "the precarious financial position of American Fuel and its subsidiaries" prior to the Columbia purchase (Vol. I, p. 594), and the fact that these companies "due to their heavy burden of securities and burdensome gas contracts" "were never able to earn their fixed charges" (*ibid*),

and that in the consequent "dubious financial condition of American Fuel and its subsidiaries" (Vol. I, p. 595) the project of the Detroit line was "its only hope of survival" (*ibid*), to attempt which was "an ambitious plan" (*ibid*), the outcome of which lay "entirely in the realm of speculation" (Vol. I, p. 600). These findings could not possibly become the basis of an opinion that Columbia deliberately injured the other bondholders by terminating the Detroit project. Instead they lead up to the Conclusion of Law of the District Court that

> "3. The conspiracy, pursuant to which Columbia acquired the claims herein asserted against the debtor, as found and described in paragraph No. 17 of the Findings of Fact was in violation of the Antitrust Laws of the United States, to-wit: The Sherman Act and The Clayton Act.
>
> "4. The following conclusions of Law stated by the Circuit Court of Appeals of the Sixth Circuit in its opinion, In re American Fuel and Power Company, 122 F. (2d) 223, are here applicable and controlling, to-wit:
>
> "(a) 'It is the duty of the Bankruptcy Court in reorganization proceedings to withhold its aid from parties seeking to obtain a benefit from an agreement tinged with illegality'."

Furthermore, this is the position that the Government has heretofore taken in this matter. The Government in its petition for intervention alleged that (Vol. I, pp. 274-5):

> *"The United States seeks leave to intervene as aforesaid in these proceedings in furtherance of its public duty to enforce the antitrust laws;* and, as a 'party in interest' within the meaning of the bank-

> ruptcy Act, as amended, (11 U.S.C. Sec. 607), is entitled to participate fully, with the rights of a party, in any proceedings involving the question of whether or not the Columbia Gas & Electric Corporation acquired, and used, its claims against the debtor in the above-entitled cause in violation of the antitrust laws of the United States." (Italics ours)

Likewise the Government in its Statement Opposing Jurisdiction filed in the United States Supreme Court in opposition to Columbia's appeal under the Expediting Act (322 U. S. 379) took the position that the language of the Expediting Act did not permit the appeal since (Vol. I, p. 703):

> "The Government's complaint in intervention in the present case cannot be brought within this language since there was no prayer for injunctive relief, but *merely a prayer for an adjudication that Columbia had violated the antitrust laws, that it had acquired its claims against the debtors in violations of these laws, and that the district court reject these claims.*" (Italics ours)

and also in the same Statement said as follows (Vol. I, p. 702):

> "The district court, after a hearing in which Columbia participated, made findings of fact and conclusions of law (attached as Exhibit B to the Jurisdictional Statement of Columbia) which set forth that Columbia had acquired its claims against the debtors pursuant to an unlawful conspiracy to restrain and monopolize interstate commerce in natural gas and that claims *so acquired* are not provable or allowable in bankruptcy reorganizations. On the basis of these findings and conclusions the court entered judgment rejecting all claims of Columbia against the debtors." (Italics ours)

Having been allowed to intervene in furtherance of what it alleged was its public duty to enforce the anti-trust laws and on the express theory that securities must be held to be unenforcible because acquired in violation of the anti-trust laws, and having reiterated this in its subsequent Statement Opposing Jurisdiction filed in this Court, how can the Government in all fairness say, as it does now in its brief, that the point is not involved in the case?

Similar expressions occur in the pleadings of the other parties to the cause who oppose the granting of our petition (Vol. I, pp. 399, 521, 522).

As to the argument of the various briefs that the decision of the Circuit Court of Appeals below simply decides that

> "* * * when a controlling stockholder of a corporation manages its affairs so as to promote, not the interests of the corporation but those of the controlling stockholder, a bankruptcy court will subordinate the claims of the wrongdoer to the claims of creditors and minority stockholders injured by this breach of trust," (Government's brief, pp. 11-12)

the decision of that Court is not to that effect. Indeed, it could not be because Columbia controlled the operating subsidiaries of the American Fuel & Power Company (the top holding company of the system) by majority stock ownership of the latter only between the dates of November 6, 1930 and December 2, 1930 (Vol. I, p. 598; Vol. 4, p. 1530), or less than a month. On this latter date of December 2, 1930 a Receiver of the operating subsidiaries of the American Fuel and Power Company was appointed by the Federal Court and took over their control and operation (Vol. I, pp. 29, 38). There is no finding of the District

Court that during this brief interval of less than a month Columbia ordered the discontinuance of the proposed Detroit line. In the District Court we requested the Court to find that the project to build the Detroit line had been abandoned by the original promoters even before the Columbia's purchase. We still believe that the record justifies such a finding. However, the District Court did not find as requested, but neither did it find that it was Columbia which was responsible for the discontinuance. On the contrary, it is found that it was the Federal Receiver who decided not to go ahead with the construction of this line. The finding of the District Court is that it was the Federal receivership which "resulted in immediate discontinuance of all efforts to promote the Detroit project" (Vol. I, p. 599). And there is no finding that the Federal Receiver was acting in collaboration in this matter with Columbia; in fact, a preliminary finding that there was such collaboration was expressly rejected by the District Court (Vol. I, p. 603).

In view of the foregoing, the decision of the Circuit Court of Appeals and the decision of the District Court must each stand on the single ground that, because it held that Columbia purchased these securities in violation of the Federal anti-trust laws, therefore Columbia cannot enforce them as against the other security holders. This is the question clearly presented by the record. Its importance in the administration of the bankruptcy laws and of the anti-trust laws cannot be overestimated. A final decision on the question by this Court is greatly to be desired by the business of the country for its guidance. It would be indeed a miscarriage of federal justice in a case of this importance to deny a petition for certiorari on the ground that the decision of the Courts below was of an entirely different character

from what their findings of fact and conclusions of law stated.

We, therefore, respectfully reiterate our request in our petition that the same be granted.

Respectfully submitted,

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August 7, 1946

FILE COPY

Nos. 119, 120 and 121.

FILED
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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1946.

COLUMBIA GAS & ELECTRIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, BEN WILLIAMSON, JR., TRUSTEE OF INLAND GAS CORPORATION, RUSSELL VAN HORN, ET AL., As a Committee for Bondholders, and MORRIS GREEN.

COLUMBIA GAS & ELECTRIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, BEN WILLIAMSON, JR., TRUSTEE OF KENTUCKY FUEL GAS CORPORATION, and MORRIS GREEN.

COLUMBIA GAS & ELECTRIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, CLINTON M. HARBISON, TRUSTEE FOR AMERICAN FUEL AND POWER COMPANY, ET AL., and LOUIS A. GREEN, and ROBERT HEILBRUNN, As a Committee for Note Holders.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE RESPONDENTS THE GREEN COMMITTEE AND MORRIS GREEN IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 129.

COLUMBIA GAS & ELECTRIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, BEN WILLIAMSON, JR., TRUSTEE OF INLAND GAS CORPORATION, RUSSELL VAN HORN, ET AL., as a Committee for Bondholders, and MORRIS GREEN.

No. 130.

COLUMBIA GAS & ELECTRIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, BEN WILLIAMSON, JR., TRUSTEE OF KENTUCKY FUEL GAS CORPORATION, and MORRIS GREEN.

No. 131.

COLUMBIA GAS & ELECTRIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, CLINTON M. HARBISON, TRUSTEE FOR AMERICAN FUEL AND POWER COMPANY, ET AL., and LOUIS A. GREEN, and ROBERT HEILBRUNN, as a Committee for Note Holders.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Brief for the Green Committee and Morris Green in Opposition.

Opinions Below.

The district court rendered no opinion but filed findings of fact and conclusions of law (R. I, 590-603[1]). The opinion of the Circuit Court of Appeals is reported in 151 F. 2d 461 (R. IX, 3-23, 46) and its opinion denying petition for rehearing is reported in 153 F. 2d 101 (R. IX, 56-57).

The opinion of this Court dismissing an appeal from the judgment of the district court is reported in 322 U. S. 379. The opinion of the Circuit Court of Appeals on an appeal taken at an earlier stage of the proceedings is reported in 122 F. 2d 223.

Jurisdiction.

The decrees of the Circuit Court of Appeals were entered on October 9, 1945; were amended on November 26, 1945, and petition for rehearing was denied on January 21, 1946 (R. IX, 1-2, 46-56). An order entered by the late Chief Justice extended petitioner's time for applying for writs of certiorari to June 1, 1946 (R. IX, 59), and the petition for writs of certiorari was filed on May 29, 1946. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Whether the equitable powers of a bankruptcy court may be exercised to subordinate claims acquired with a wrongful intent and used to the damage of the other claimants.

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1. Since the pagination of the nine volumes of the record is not consecutive, the volume and page of the record will be designated, respectively, by Roman numerals and Arabic numerals.

Statement.

These appellees adopt the statement set forth in the Government's brief.

Argument.

I.

Petitioner contends that the court below erroneously based its decision upon a finding that Columbia had violated the anti-trust laws and the Court then applied a penalty not provided for under such laws. The decision below was not based upon the grounds stated by petitioner and the question raised is thus not presented. Although petitioner emphasizes its violation of the anti-trust laws, this is not a proceeding to enforce the Sherman Act, and the principles of law involved are governed solely by a determination of the equity powers of the bankruptcy court in adjudicating claims. The court below did not base its decision upon a violation of the anti-trust law, but rather upon the facts which resulted in such a violation, and in considering these facts properly evaluated petitioner's wrongful intent, purpose and conduct in purchasing and utilizing the securities upon which it asserted and still asserts its claims. The court imposed no penalties; it but exercised its equity power to deny relief to a creditor seeking enforcement of contracts entered into illegally and tainted with iniquity.

Hartford-Empire Co. v. *United States,* 323 U. S. 386, upon which petitioner so heavily relies, was considered by the court below and properly distinguished from the case at bar. In the *Hartford-Empire* case the Government had instituted the action and was asserting that dedication of some of Hartford's patents was necessary to eliminate the obnoxious features of the conspiracy and the abuses arising out of the illegal use of those patents. In the

Hartford-Empire decision this court reiterated its holding in *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488 and *B. B. Chemical Company* v. *Ellis*, 314 U. S. 495, to the effect that a patent-owner is denied enforcement of his patent rights against infringers, so long as the patent-owner is using his patent in violation of the anti-trust laws. Such patent-owners asserting claims against infringers are in a similar position to the petitioner herein.

The court below in distinguishing the *Hartford-Empire* case, *supra*, from the case at bar, stated (R. IX, 22):

> "It may well be, under the facts of the *Hartford-Empire* case, that there remained to the appellants there, property rights which, when their owners had abandoned their illegal use and been purged of inequity, could still be enforced against subsequent infringers. Such rights the court would not allow to be confiscated. This doctrine has no application to the present status of Columbia, at least in respect to the subordination of its claims by the decree. In that respect the decree merely denies enforcement of the Columbia claims precisely as the *Hartford-Empire* decision denies enforcement of patents illegally used against those infringing during such illegal use. The fruits of Columbia's inequitable activities are still retained in its freedom from competition by American Fuel, and Columbia's suggested remedy would still leave wronged stockholders and creditors without relief, for a restoration of the *status quo ante* is manifestly now impossible."

II.

Petitioner's insistence that its violation of the anti-trust laws resulted in penalties not provided for under the anti-trust statutes is completely erroneous. Although

the facts which establish petitioner's wrong-doing in both its original purchase of the bonds and its later purchase of the claims and stock were a violation of the anti-trust laws, nevertheless, assuming that there were no anti-trust laws, petitioner's wrong-doing would still have been proscribed by a court of equity. The court rightfully refused to lend its aid to a wrong-doer who was asserting claims against a bankrupt estate which, if granted, would result in the wrong-doer receiving a premium for his evil acts at the expense of the persons whom he had injured.

To support its contention that a party to an illegal combination restraining competition is not deprived of protection of his property, petitioner relies upon the District Court's opinion in *Standard Oil Co.* v. *Markham,* 61 F. Supp. 813. However, that case is one in which Standard Oil was seeking to recover patents from the Alien Property Custodian, who was asserting that the former use of the patents in violation of the anti-trust laws compelled a dedication of such patents. In the *Standard Oil* case, *supra,* the Court followed the ruling in the *Morton Salt* and *B. B. Chemical* cases, *supra,* and held:

> "* * * the *Morton Salt Co.* case stands for the proposition that so long as a patent owner is using his patent in violation of the anti-trust laws he cannot restrain infringement of it by others. In the instant case plaintiffs, whatever may have been their past conduct, are not currently using the patents here involved in violation of the anti-trust laws." (p. 815)

In the case at bar American Fuel and its subsidiaries cannot be placed in *status quo ante;* and claimants, other than petitioner, have been permanently and irretrievably damaged.

Conclusion.

The decision below is correct and should not be disturbed. There is no conflict of decision. The petition for a writ of certiorari should be denied.

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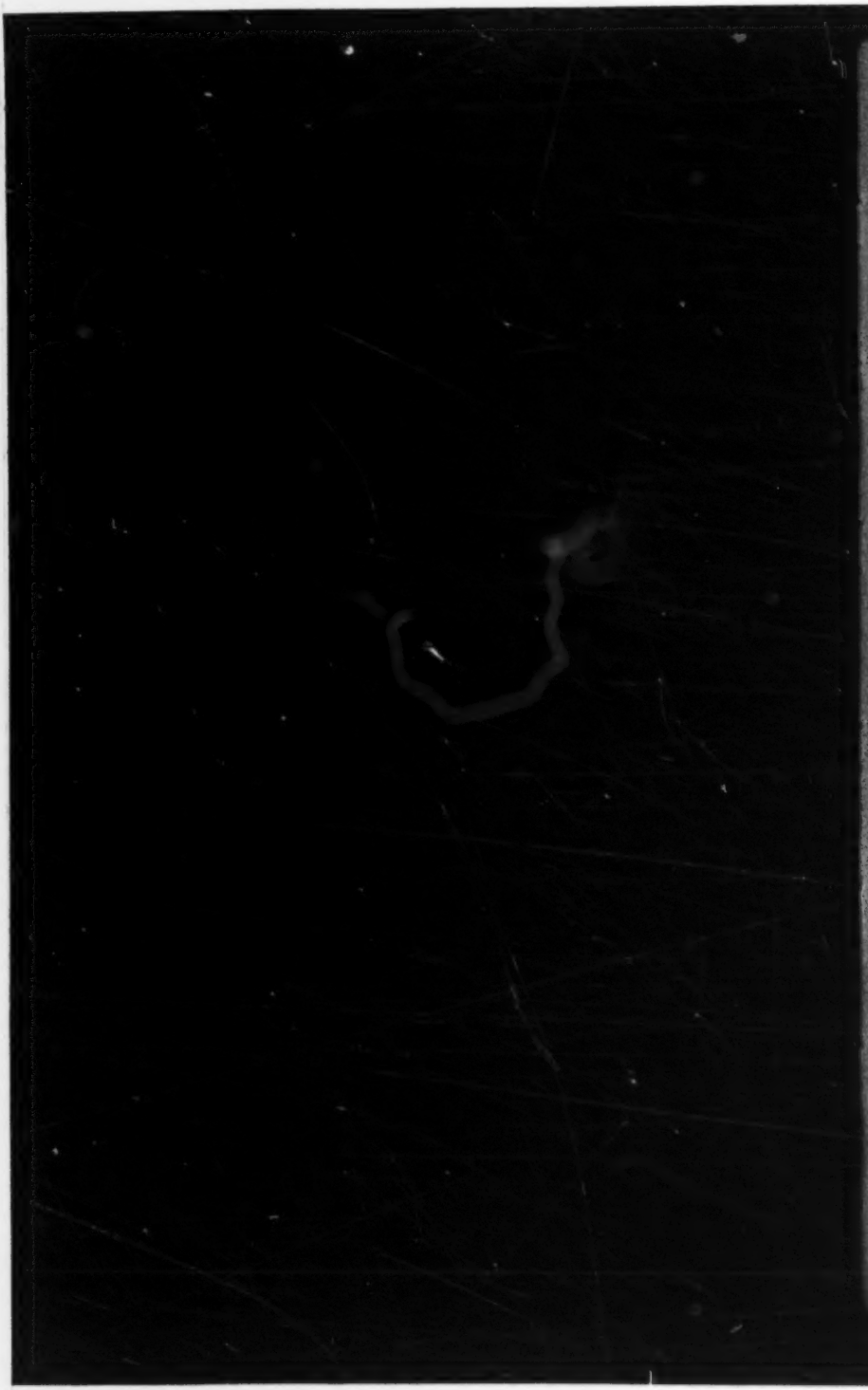

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In the Supreme Court of the United States

OCTOBER TERM, 1946

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ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The district court rendered no opinion but filed findings of fact and conclusions of law (R. I, 590–603[1]). The opinion of the Circuit Court of Appeals is reported in 151 F. 2d 461 (R. IX, 3–23, 46) and its opinion denying petition for rehearing is reported in 153 F. 2d 101 (R. IX, 56–57).

The opinion of this Court dismissing an appeal from the judgment of the district court is reported in 322 U. S. 379. The opinion of the Circuit Court of Appeals on an appeal taken at an earlier stage of the proceedings is reported in 122 F. 2d 223.

JURISDICTION

The decrees of the Circuit Court of Appeals were entered on October 9, 1945, and were amended on November 26, 1945, and petition for rehearing was denied on January 21, 1946 (R. IX, 1–2, 46–56). An order entered by the late Chief Justice extended petitioner's time for applying for writs of certiorari to June 1, 1946 (R. IX, 59),

[1] Since the pagination of the nine volumes of the record is not consecutive, the volume and page of the record will be designated, respectively, by Roman numerals and arabic numerals.

and the petition for writs of certiorari was filed on May 29, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below erred in holding that a proper exercise of the equitable powers vested in bankruptcy courts in corporate reorganization proceedings requires that the claims against the debtor corporations which the petitioner had acquired, together with stock control, for the purpose and with the effect of precipitating foreclosure proceedings against the debtor corporations and preventing their successful operation, be subordinated to the claims of all other creditors of the debtor corporations.

STATEMENT

The proceedings leading up to the decision sought to be reviewed are summarized in *Columbia Gas & Electric Corp.* v. *American Fuel and Power Company,* 322 U. S. 379, and may here be briefly restated.

Separate proceedings were brought under the Bankruptcy Act for the reorganization of American Fuel and Power Company and two of its subsidiaries, Inland Gas Corporation and Kentucky Fuel Gas Corporation (referred to herein, respectively, as American Fuel, Inland and Kentucky Fuel). The Securities and Exchange Commission became a party to the proceedings

pursuant to Section 208 of the Bankruptcy Act (11 U. S. C. 608). Petitioner, as the holder of various claims against the debtors, filed its proofs of claims in the reorganization proceedings; and the district court, on application of the debtors' trustees, entered an order approving a proposed compromise settlement of petitioner's claims. On appeal by certain creditors, the Circuit Court of Appeals reversed this order upon the ground that the facts disclosed that petitioner had acquired and used its claims in violation of the federal antitrust laws and that such claims are not provable or allowable claims in a bankruptcy reorganization. In rejecting the proposed compromise the court also relied upon the equitable principles applied in *Taylor* v. *Standard Gas & Elec. Co.*, 306 U. S. 307, and *Pepper* v. *Litton*, 308 U. S. 295.[2] The cause was accordingly remanded to the district court with instructions to reject all claims which the petitioner had acquired in violation of the federal antitrust laws.[3] 122 F. 2d 223.

Following remand to the district court, the United States, which had instituted an equity proceeding against petitioner in another federal

[2] This was the position urged by the Securities and Exchange Commission.

[3] The opinion pointed out that petitioner had not appeared in the proceeding for approval of the proposed compromise of its claims and that it was therefore not bound by the facts stated in the court's opinion.

district court based upon allegations that it had acquired control of the American Fuel companies in violation of the antitrust laws, was allowed to intervene. After a trial in which petitioner participated, the district court, after filing findings of fact and conclusions of law, entered judgment rejecting all the petitioner's claims (R. I, 604).

The findings of the district court, having been approved by the appellate court, represent the concurrent findings of two federal courts. The findings disclose the following:

Inland, Kentucky Fuel, and American Fuel were organized in 1927 and 1928 by the same group of persons to acquire natural gas reserves in eastern Kentucky and to transport and sell gas from this field to industrial consumers (Fngs. 1–3; R. I, 590–593). Bonds or secured notes of the companies were sold to the public, the promoters and underwriters retaining all of their common stock (*ibid.*).[4] From the beginning the companies were under the management of Hope Engineering Company (referred to herein as Hope), which had wide experience in building natural gas transmission lines and in successfully promoting natural gas enterprises (Fng. 10; R. I, 595).

[4] When American Fuel was organized, the common stock of Kentucky and Inland Fuel was exchanged for that of American Fuel, which then became the parent of Inland and Kentucky Fuel (Fng. 3; R. I, 591–592).

Prior to the organization of the American Fuel System, petitioner's subsidiaries, which produced, transported, and sold natural gas to industrial and domestic consumers in Kentucky, Ohio, and West Virginia, enjoyed virtual freedom from competition in the fields which they occupied in these states (Fngs. 5, 7; R. I, 593–594). The operations of the American Fuel companies changed the situation and took away some of the largest industrial customers of petitioner's subsidiaries (Fng. 7; R. I, 594). By the end of 1929 this competition had become "serious and threatening" (*ibid.*).[5]

Inland and Kentucky Fuel sustained substantial operating losses in 1928 and 1929 (Fng. 9; R. I, 594) and it was recognized that a large expansion of business was necessary to make the enterprise profitable. Hope proposed, as a solution to the problem, that the companies undertake to supply gas to industrial users in the Detroit area, which was not then served with natural gas. Hope succeeded in enlisting the participation of a group (referred to herein as the Syndicate) having sufficient "financial strength and business experience to foreshadow success" of the under-

[5] As the court below noted (R. IX, 17–18), petitioner "was fully conscious of the threat to its subsidiaries" and it "manifested early and continued hostility to the venture, and exerted every possible influence to thwart its successful fruition."

taking.[6] This Syndicate made an immediate investment of $654,000 and acquired more than half of the stock of American Fuel. The Syndicate, through controlled corporations, applied for a franchise to lay gas pipe lines under the streets of Detroit, surveyed and acquired the right of way for a transmission line from eastern Kentucky gas fields, started the work of laying pipes under the Ohio River, and secured contracts for sale of gas to industrial consumers both in the Detroit area and in the territory adjacent to the proposed line. A nationally known and highly reputable natural gas engineer, who was employed to investigate and analyze the project, reported that "the gas reserves are sufficient, the industrial market is adequate and * * * this project as a whole is a sound business proposition." (Fng. 10; R. I, 595–597.)

During this same time petitioner was making plans to supply natural gas to Detroit from its Kentucky and West Virginia fields (Fng. 11; R. I, 597). These plans were "seriously threatened" by the proposed expansion of the American Fuel System (Fng. 12; R. I, 597). During the first four months of 1930 petitioner undertook

[6] The Syndicate consisted of "a prosperous and successful investment trust" allied with a strong banking organization which had financed many gas enterprises and an organization which had successfully built and operated natural gas projects (Fng. 10; R. I, 595).

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to put itself in a position to force foreclosure and sale of the properties of Inland and Kentucky Fuel, by buying on the open market, while concealing the fact that it was purchaser, more than 25% of the bonds of each of these companies (Fng. 9; R. I, 595).[7]

The negotiations resulting in petitioner's acquisition of the Syndicate's interest in the American Fuel System were initiated by O. R. Seagraves, a Syndicate member whose confidence in the Detroit project had been considerably shaken (Fng. 14; R. I, 599–600).[8] The other Syndicate members, however, did not fully share his views and the large profit which they realized from the sale to petitioner was the principal inducement leading them to agree to the deal (*ibid.*). Under the contract made October 30, 1930, petitioner paid the Syndicate $2,826,789.28, which reimbursed the Syndicate's entire investment in the American Fuel System and gave the Syndicate a clear profit of $350,000 (Fng. 13; R. I, 598). In addition, petitioner agreed to employ Hope on work on terms which would give it not less than $800,000

[7] The companies' bond indentures provided that if there was a default in interest or sinking fund requirements the indenture trustees should, upon the request of the holders of 25% in principal amount of the bonds, declare defaults and institute foreclosure proceedings (Fng. 9; R. I, 594–595).

[8] A collateral inducement in his case was the prospect of his making a profitable contract with petitioner with reference to gas fields in the Southwest in which he was interested (*ibid.*).

as compensation, an obligation which petitioner later discharged by paying Hope $400,000 without its having done any work (Fng. 13; R. I, 598–599).

The Syndicate had not abandoned the Detroit project at the time that it sold its holdings to petitioner but whether the project would have ultimately succeeded lies in the realm of speculation (Fng. 15; R. I, 600).

Prior to petitioner's acquisition of control of the American Fuel companies, its responsible executive officers had stated that it would not lie idly by and permit the construction of a pipe line through the heart of its territory as proposed by the Syndicate (Fng. 16; R. I, 600).[9] In buying out the Syndicate, petitioner had agreed to save Hope harmless on its obligation to advance funds to meet sinking fund obligations of the debtors (Fng. 13; R. I, 599). By the use of claims acquired by petitioner from the Syndicate, it promptly precipitated receivership proceedings against Inland and Kentucky Fuel and petitioner's nominee became receiver of the companies (Fng. 13; R. I, 599). Petitioner's acquisition of control resulted in immediate discontinuance of all efforts to promote their Detroit project and of

[9] As the court below pointed out, petitioner's president had declared that "if anyone thinks Columbia will allow a ditch to be dug across the State of Ohio, he is just crazy" and that if Columbia came into the picture it would have to "put the company [American Fuel] through the wringer" (R. IX, 18).

any additional competition between subsidiaries of petitioner and American Fuel (*ibid.*). Petitioner's main purpose in acquiring control of the American Fuel System was to restrain actual and potential competition and any plan to utilize the properties of the System as a legitimate adjunct of its own business was merely collateral and incidental to this main purpose (Fng. 17; R. I, 601).

On appeal, the court below held that the case was governed by the principles laid down in *Pepper* v. *Litton,* 308 U. S. 295, and *Taylor* v. *Standard Gas & Elec. Co.,* 306 U. S. 307—that a bankruptcy court sits as a court of equity in passing upon claims and will not, under ordinary equitable principles, recognize a claim "which is being asserted as part of a scheme by a dominating stockholder to defeat the lawful prior claims of creditors" (R. IX, 14). The court further held that these principles were applicable because the debtors and their creditors had been injured by petitioner's "inequitable or illegal conduct" (R. IX, 15). This injury resulted from the fact that petitioner's activities had "forever destroyed" the opportunity for recovery and profit afforded by the expanded market which completion of the Detroit pipe line would open up (R. IX, 19). Opportunity to pursue this project, in which lay the debtors' hope of financial rehabilitation, was clearly a valuable asset of theirs which petitioner, in the pursuit of its own conflicting interest, had

destroyed. As the court below said, "It is idle, therefore, to contend that the elimination of that prospect was not an injury to them [the debtors and their creditors], however impossible it may be to measure their damage" (R. IX, 20).

The court amended the district court's judgment so as to subordinate petitioner's claims to the claims of all other creditors of every other class, and affirmed the judgment as so amended (R. IX, 46).

ARGUMENT

I

The petitioner contends (1) that the basis upon which the court below subordinated petitioner's claims was that the claims had been acquired in violation of the federal antitrust laws and (2) that the court, in thus subordinating its claims as a means of vindicating these laws, erroneously inflicted a penalty for violation which the laws themselves neither authorize nor prescribe (Pet. 22).

The Government submits that the decision below does not rest upon the ground stated by petitioner and that the legal question raised by the second part of its contention is therefore not presented. The court below, as previously stated (*supra*, p. 10), merely applied the general principle that when a controlling stockholder of a corporation manages its affairs so as to promote, not the in-

terests of the corporation but those of the controlling stockholder, a bankruptcy court will subordinate the claims of the wrongdoer to the claims of creditors and minority stockholders injured by this breach of trust. With respect to the antitrust laws the court held merely that "the power and duty of equity" to require subordination of petitioner's claims could not be limited by the fact that petitioner's inequitable conduct was such that it violated those laws. The court said (R. IX, 21):

> The argument that the court, for alleged violations of the Anti-Trust Laws, imposed in a bankruptcy proceedings penalties other than those specified in the Anti-Trust Statutes, must be rejected. The court imposed no penalties; it but exercised its equity power to deny relief to a creditor seeking enforcement of contracts entered into illegally or tainted with inequity. To apply the doctrine so vigorously urged by Columbia, is to deny the power and duty of equity, to reject demands arising out of illegal or inequitable conduct whenever such conduct is subject to legal penalties imposed by state or federal law, and so to limit it to that narrowly restricted field in which the chancellor may sense inequity even in the absence of statutory condemnation. A denial of this contention does not mean, of course, that the power may be invoked in respect to conduct consti-

tuting no wrong to the parties or interests in litigation.

The essence of the court's decision is that the petitioner's claims were subordinated because of petitioner's inherently inequitable conduct. Certainly, the general duty of a bankruptcy court to subordinate the interests of a claimant guilty of inequitable conduct does not disappear when such inequitable conduct may, in addition, constitute a violation of the antitrust laws or any other laws. The crucial consideration here is that the decision turned on petitioner's inequitable conduct, without regard to whether or not there had been a violation of the antitrust laws. Accordingly, the decision below does not raise the question which petitioner seeks to present (Pet. 2–3), namely, whether a creditor who had violated the antitrust laws in acquiring the credit must be subordinated to other creditors.

II

Petitioner also contends (Pet. 29) that, in the absence of injury caused by petitioner to the security holders of the debtor corporations, the judgment of subordination was beyond the general equity powers of the court. The question sought to be raised is not presented since the court below explicitly declared that injury caused by petitioner's wrongdoing was essential to the validity of the judgment entered in this case. The

court said: "To sustain the judgment below the appellees must have proved not only inequitable or illegal conduct, but that the debtors, the stockholders or public creditors were injured thereby" (R. IX, 15). Furthermore, the major portion of the opinion (apart from the court's recital of the facts and applicable legal principles) is devoted to rebuttal of the various grounds upon which petitioner asserted that its actions were not shown to be injurious to the debtor corporations and their security holders (R. IX, 15–21).

Petitioner contends (Pet. 19, 32) that the debtors were doomed to failure and that this would have occurred if the petitioner had never entered the picture. This assertion is belied by the findings and by petitioner's own action. Until petitioner gained control of the debtors the Detroit project, which held out substantial prospect of success, had not been abandoned by the Syndicate, which was "ready, able and willing" to continue its efforts to develop the project (Fng. 15; R. I, 600). The contention that the debtors were headed for receivership and could never have rehabilitated themselves if petitioner had not intervened is totally inconsistent, as the court below pointed out, with the fact that petitioner "paid approximately $3,000,000 for stock control [of the debtors] and assumed heavy obligations subsequently liquidated by substantial payments" (R. IX, 18). What petitioner was

interested in was the failure of the American Fuel enterprise; and petitioner, in effect, appraised the chances of success of the enterprise as warranting an expenditure of well over $3,000,000 to assure failure.

Petitioner attempts (Pet. 31–32) to distinguish the nature of the injury to the debtors in this case from the injury to the debtor corporation in the *Deep Rock* case (*Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307). It is entirely fortuitous that the parent company whose claim was subordinated in the *Deep Rock* case was the promoter of the debtor and that the mismanagement there revealed had covered the entire life span of the debtor, whereas the present petitioner acquired control of the debtors when they were suffering under handicaps attributable to persons not connected with petitioner.[10] The equitable basis for resolving any doubt as to the consequence of petitioner's wrongdoing is far stronger here than in the *Deep Rock* case in view of the fact that petitioner deliberately intended to stifle the debtors. Any claim to distinction based upon differences of degree as to the certainty of harmful consequences

[10] Subordination in the *Deep Rock* case, as this Court subsequently pointed out, "was based on the equities of the case—the history of spoliation, mismanagement, and faithless stewardship of the affairs of the subsidiary by Standard to the detriment of the public investors". *Pepper* v. *Litton*, *supra*, p. 308.

from the misconduct of the dominant corporation raises merely a question of causation, which is basically one of fact. Petitioner concedes (Pet. 8) that it is not warranted in asking this Court to reexamine the voluminous record in view of the concurrent findings of both lower courts.

III

While petitioner has made little attempt to deal with the actual grounds of decision of the court below or to show error therein, the court's decision as we shall show, falls squarely within principles which this Court has repeatedly applied.

Petitioner secured control of the debtors with the intent of acting solely in its own interest by destroying a serious threat to its monopolistic position, and petitioner immediately accomplished its purpose by causing the debtors to collapse. Petitioner neither expected nor desired the debtor companies to prosper since their prosperity meant further inroads on petitioner's industrial gas business.[11] Petitioner's acquisition of the debtor's securities was incident to its scheme to profit at the expense of its fellow security holders, to whom petitioner, as a controlling security holder, owed fiduciary duties. This principle of fiduciary re-

[11] As pointed out by one of petitioner's witnesses, the American Fuel System took "the cream of the business" and left petitioner "the skimmed milk" (R. IV, 1862).

sponsibility is well settled.[12] In *Farmer's Loan and Trust Co.* v. *New York & N. Ry. Co.*, 150 N. Y. 410, 431, the court said that "a corporation, purchasing a majority of the stock of another competing one, cannot obtain control of its affairs, divert the income of its business, refuse business which would enable the defaulting company to pay its interest, and then institute an action in equity to enforce its obligations, for the avowed purpose of obtaining entire control of its property to the injury of the minority stockholders."

This Court has repeatedly held that a bankruptcy court, as a court of equity, should require the subordination or disallowance of the claims and interests of a guilty parent company to those of public investors in its subsidiaries. *Taylor* v. *Standard Gas & Electric Co., supra; Pepper* v. *Litton, supra; American United Mut. L. Ins. Co.* v. *City of Avon Park,* 311 U. S. 138, 149; *Sampsell* v. *Imperial Paper & Color Corp.,* 313 U. S. 215, 219. Subordination and disallowance are equitable remedies to undo the wrong where control has been exercised "for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the *cestuis.*" *Pepper* v. *Litton, supra,* at p. 311. Petitioner's conduct falls di-

[12] *Jackson* v. *Ludeling*, 21 Wall. 616, 622; *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 492; *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307; *Pepper* v. *Litton*, 308 U. S. 295.

rectly within this description despite the fact, emphasized by petitioner, that it purchased the debtors' securities for value. Application of subordination does not depend upon technical concepts and is not limited to any narrow fact situation. A "sufficient consideration may be simply the violation of rules of fair play and good conscience by the claimant; a breach of the fiduciary standards of conduct which he owes the corporation, its stockholders and creditors." *Id.* at pp. 310–311.

Thus the subordination enforced by the judgment below is no more than an application of the general principles that a guilty fiduciary must bear all the risks of loss inherent in his conduct (Scott, *Trusts* (1939), Sec. 205) and of the maxim that one must come into equity with clean hands. Such treatment is appropriate to prevent petitioner from participating on a parity with other investors in the assets of the insolvent estates since the predicament in which the estates find themselves stems from petitioner's precipitation of receiverships and the accompanying abandonment of the Detroit project. The fact that petitioner acquired its claims pursuant to a conspiracy in violation of the federal antitrust laws further emphasizes the illegality and inequity of the acts of petitioner causing injury to the debtor corporations and their security holders.

Where a transaction between a corporation and its controlling stockholder is challenged, the burden is on the latter "not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein." *Pepper* v. *Litton, supra,* at p. 306. It is exactly because it may be impossible to determine to what extent the actions of petitioner, which were taken on its own behalf in disregard of the rights of its cestuis, prevented future success that subordination is appropriate. It provides a remedy for innocent security holders against wrongful conduct even though the extent of their injury may not be susceptible to legal proof. In the *Deep Rock* case, *supra,* where the Court required subordination, the Court said (at p. 323):

> It is impossible to recast Deep Rock's history and experience so as even to approximate what would be its financial condition at this day had it been adequately capitalized and independently managed and had its fiscal affairs been conducted with an eye single to its own interests.

CONCLUSION

The decision below is correct and there is no conflict of decisions. The principal question which petitioner seeks to present is not raised by the decision below. It is therefore respectfully

submitted that the petition for a writ of certiorari should be denied.

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JULY 1946.

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IN THE

Supreme Court of the United States

No. 129.

October Term, 1946.

COLUMBIA GAS & ELECTRIC CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, BEN WILLIAMSON, JR., Trustee of INLAND GAS CORPORATION, RUSSELL VAN HORN, et al., as a Committee for Bondholders, and MORRIS GREEN.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR RUSSELL VAN HORN, WENDELL E. WARNER AND EDWARD AUSTIN WATERS, AS A COMMITTEE FOR BONDHOLDERS OF INLAND GAS CORPORATION, IN OPPOSITION.

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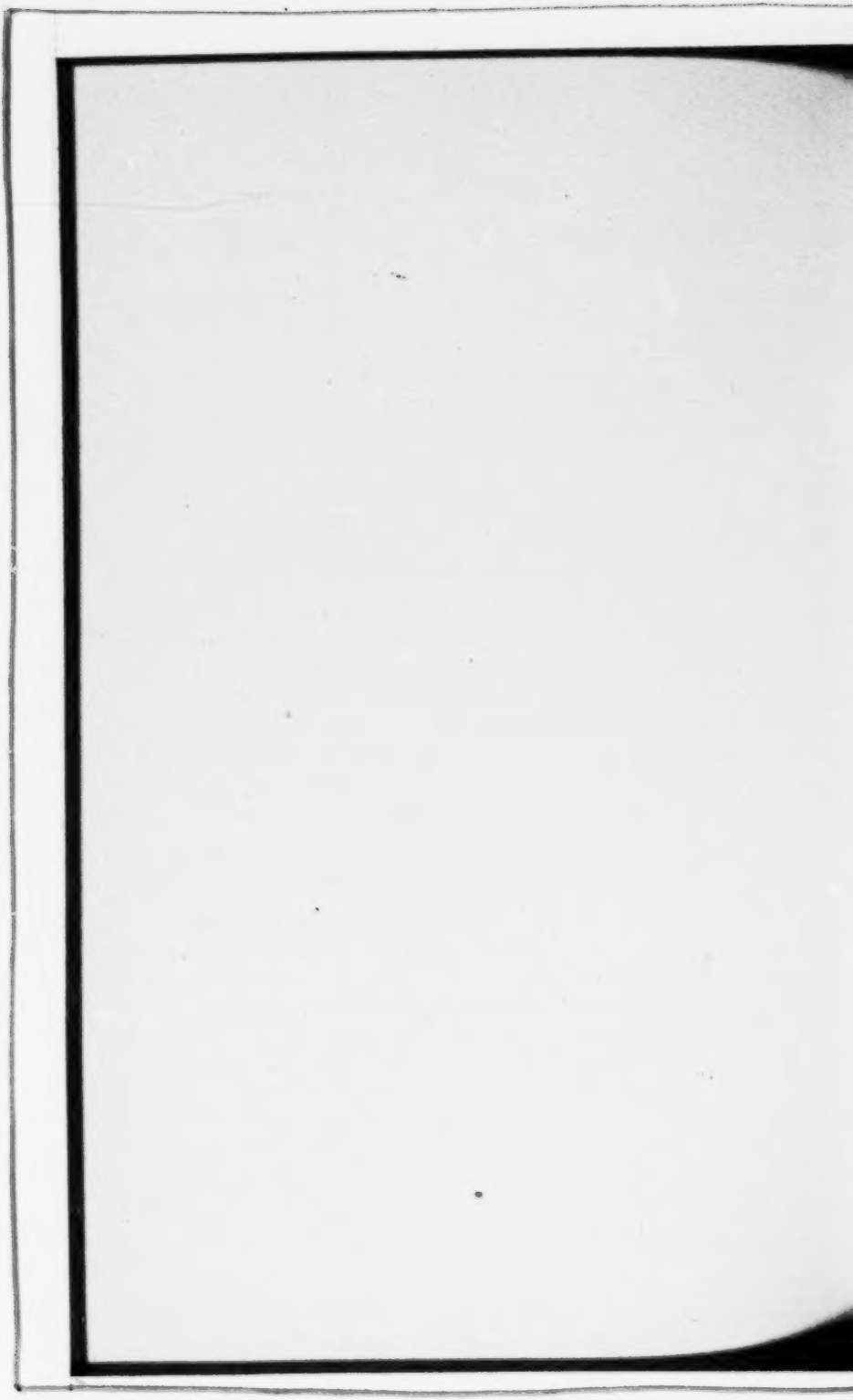

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BRIEF FOR RUSSELL VAN HORN, WENDELL E. WARNER AND EDWARD AUSTIN WATERS, AS A COMMITTEE FOR BONDHOLDERS OF INLAND GAS CORPORATION, IN OPPOSITION.

FOREWORD.

The District Court consolidated for trial three causes. (R. I, 434.)[1] They were also consolidated on appeal into one Record. (R. I, 665.) Columbia[2] filed a Petition for Writs of Certiorari in each of the three causes. The Circuit Court of Appeals rendered a single opinion. (R. IX, 3-23). The Circuit Court of Appeals, however, entered

[1] Record references will be to Volume in Roman numerals and to Page in Arabic numerals.

[2] Hereinafter, the same abbreviations will be used in this brief as in Columbia's Petition and Brief.

three separate decrees. (R. IX, 1-2.) This brief is in opposition in only one of said causes, namely, the one above-captioned. These respondents have no interest in the other two causes.

OPINIONS BELOW.

The District Court rendered no opinion but filed Findings of Fact and Conclusions of Law. (R. I, 590-603.) The opinion of the Circuit Court of Appeals is reported in 151 F. 2d. 461 (R. IX, 3-23, 46), and its opinion denying petition for rehearing is reported in 153 F. 2d. 101. (R. IX, 56-57.)

The opinion of this Court dismissing an appeal from the judgment of the District Court is reported in 322 U. S. 379. The opinion of the Circuit Court of Appeals on an appeal taken at an earlier stage of the proceedings is reported in 122 F. 2d. 223.

JURISDICTION.

The decrees of the Circuit Court of Appeals were entered on October 9, 1945, and were amended on November 26, 1945, and petition for rehearing was denied on January 21, 1946. (R. IX, 1-2, 45-46.) An order entered by the late Chief Justice extended petitioner's time for applying for writs of certiorari to June 1, 1946 (R. IX, 59), and the petition for writs of certiorari was filed on May 29, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

The Findings of Fact and Conclusions of Law of the District Court involve not only Inland but the other two companies. (R. I, 590-602.)[3] The Findings of Fact are

[3] For the convenience of the Court we reproduce the Findings of Fact and Conclusions of Law as Appendix "A" to this brief.

of course the ultimate facts, and in order that their true scope may be understood it is necessary to understand some of the details upon which they are founded. The "Summary Statement" contained in Columbia's Petition is not a fair presentation of the case in so far as it involves Inland as it does not contain all that is material to the consideration of the Inland case, and, therefore, we set forth the following concise statement of the case in so far as it involves Inland.

Inland was incorporated on March 30, 1927. (R. II, 332.) Columbia acquired control of it on November 6, 1930, and caused it to be placed in receivership on December 2, 1930. (Infra, pp. 10 to 12.) Between the time it was incorporated and the time when Columbia acquired control, Inland had acquired extensive gas reserves and valuable gas purchase contracts, assuring it of an adequate gas supply, had built a pipe line from the fields to supply gas in Ashland, Kentucky; Huntington, West Virginia; Ironton, Ohio and the vicinity of said towns, had taken many of Columbia's industrial customers, *had demonstrated that it was in a position to take all of Columbia's industrial customers within reach of its pipe lines, and its earnings were rapidly increasing.*

The gas purchase contracts Inland had obtained were made with Piney Oil & Gas Company and Hamilton Gas Company and in Columbia's Petition, page 10, are referred to as having been burdensome gas purchase contracts. However, they were only burdensome if markets for gas could not have been found. This was admitted by Mr. Reynolds, the President of Columbia, on cross-examination. He testified with respect to said gas contracts:

> "Q. You knew that these gas reserves and contracts were valuable? A. Yes, certainly.
>
> "Q. And that they were burdensome only to the extent that they could not find markets for them, did you not? A. That is correct." (R. III, 1338.)

Inland had to pay a substantial discount to raise the necessary funds to build its pipe line, but the discount was not out of line with discounts natural gas pipe line companies were currently being forced to pay. Panhandle Eastern Pipe Line Company, which was built in 1930, was forced to pay a discount of substantially the same amount under a contract to which a subsidiary of Columbia was a party. (R. III, 1307, 1312, 1315.) Columbia itself, in the early days, had paid a discount as much as, if not more than, that paid by Inland. (R. III, 1318, 1321.)

Inland was not doomed to certain financial disaster as Columbia would have the Court believe, but instead had likely prospects of real success regardless of whether or not the Detroit project was completed. Inland served industrial customers only, and in that manner operated without being regulated by State or Federal authorities. This gave Inland a competitive advantage over the Columbia subsidiaries, all of which served both industrial customers and domestic customers. The competitive advantage came about due to the fact that all companies in the Kentucky-West Virginia-Ohio area *serving both industrial and domestic customers* were regulated by State authorities and one of the regulations required them to serve domestic customers first. The Columbia subsidiaries serving in the area reached by the Inland pipe lines on many occasions prior to 1928, had been forced to curtail deliveries to industrial customers or to shut down completely during cold weather in order to serve domestic customers. This had caused many complaints and when the Inland pipe line was built and Inland was able to offer gas on an uninterruptible basis to industrial customers, many who had previously been served by Columbia turned to Inland. (R. V, 2233-2239, 2460, 2510-2537; I, 578-581.)

Not only were the Columbia subsidiaries in a position where they could not offer gas to their industrial customers on an uninterruptible basis, but Inland was in a position where it could buy gas more advantageously because only

serving industrial customers allowed it to operate on a more constant load factor. (R. IV, 1414-1416.) Furthermore, Inland, being unregulated, could grant preferential rates and make its own credit terms. (R. I, 581.)

The extent of Inland's threat to Columbia is found in the fact that approximately one-quarter of Columbia's total gas sales was to industrial customers. The dollar volume of industrial sales by the Columbia subsidiaries in 1930, which was after Inland had made serious inroads into the business, was $12,683,258.00. (R. VI, 2949.) On cross-examination Columbia's President admitted that Inland enjoyed this competitive advantage which put it in a position where it could take all of Columbia's industrial business. Mr. Reynolds testified:

> "The Court: I think the question was the possibility of an extension following the original development that would increase the menace or the harm to your business whether or not that was contemplated by you as one of the dangers with which you were confronted."
>
> "The Deponent: Let's put it this way, sir: I think we felt that a company coming in there like that, if it had adequate gas and held itself out only for a non-regulated business to industrial customers only, it *could take all of our industrial business in that way,* if it wanted it. That was not a business on which we were on a parity with them." (Italics supplied.) (R. III, 1340.)

He testified that due to this competitive advantage many customers were taken and "we didn't like to lose earnings" (R. III, 1339) and "we didn't like it". (R. III, 1331.)

Judge Harold A. Ritz, counsel for Columbia in 1930, testified that due to this competitive advantage Inland took the principal customers of Columbia in the Ashland area,

(R. IV, 1862) that it was a matter of concern to Columbia that Inland served only industrial customers and said: "Yes, we were losing a good bit of our business, and *it was the cream of the business.* They took the cream and left us the skim milk". (R. IV, 1862.)

This concern which Columbia officials felt over the potential inroads of Inland into the "cream" of Columbia's business had been manifest from the first time Columbia had heard of the plan to have Inland build a pipe line and engage in the sale of natural gas to industrial customers only. The testimony discloses that from the beginning Columbia hoped to destroy Inland. (R. II, 301; III, 954-955, 1328-1331, 1334, 1340; IV, 1516-1518, 1862.)

In 1928 Columbia officials heard of the plan to have Inland build a pipe line and engage in the business of selling natural gas to industrial customers only. (R. II, 300.) They immediately proceeded to "watch" Inland. Mr. Gossler, then President of Inland, instructed Mr. Reynolds, then Vice President, to investigate and Mr. Gossler reported to the Board. (R. III, 1327-28.) The top executive officials of Columbia had numerous discussions about the plans of Inland and "discussed its significance". (R. III, 1243-44, 1328-30.) They protested to the Better Business Bureau in an effort to prevent Inland from selling bonds to the public. (R. III, 1245, 1328-30.) They "investigated the situation as it stood then". (R. III, 1245.) They "watched Inland and Kentucky Fuel from the time they put out their first bonds * * * and tried to get information." (R. IV, 1516.) Columbia's scouts watched the progress of Inland's and Kentucky Fuel's activities in the field. (R. III, 1394-96, 1341-43, 1348-49, 1285.) They watched their sales. (R. III, 1398.) And they got information concerning their negotiations. (R. III, 1341-43.)

Although Inland made serious inroads into Columbia's business, it did not earn its bond interest during the first few years and the Columbia officials came to the conclusion that Inland might default in the payment of interest. (R.

IV, 1517, 1741.) They found out that, if so, the holder of 25% in principal amount of the outstanding bonds would be in a position where he could force the declaration of a default and thereby accelerate payment of the entire mortgage and could force a foreclosure sale and govern the time of such a sale. (R. III, 1255-58, 1348-49, 1405-06; IV, 1529.) With this knowledge in mind, Columbia started to buy Inland bonds secretly. (R. III, 1406-07.) The matter was kept so secret that not even all the Columbia directors were advised that the purchases were being made. (R. III, 833, 1406-07.) Between January 20, 1930, when the first purchases were made and April 30, 1930, Columbia spent a total of $1,079,804.43 for Inland bonds without approval of the board or the executive committee, and thereby acquired more than the 25% needed to force a default and a foreclosure. (R. III, 1405-07; Ex. A. to Ans. to Int. #1, R. VIII, 712.) Later Columbia purchased additional bonds to be in a better position at a foreclosure sale to buy and to be in a position to control and govern any reorganization or foreclosure. (R. IV, 1528-29; III, 1365.) Columbia also purchased $320,100.00 of Inland's debentures in order to have a commanding position in the event of any foreclosure or reorganization forced by Columbia. (Ex. A. to Ans. to Int. #1, R. VIII, 714; R. III, 1365.)

The default Columbia expected to occur in the spring or summer of 1930, did not occur, however, due to the fact that the Syndicate was organized by Hope which, as the District Court found, "constituted a sufficient combination of financial strength and business experience to foreshadow success." (Finding #10.) This Syndicate proceeded to advance money to Inland to cover its interest requirements and sinking fund requirements. (R. II, 518.) This placed Inland in a position where it could go out and acquire additional customers from Columbia and expand its markets to a point where the Piney Oil and Gas Company and the Hamilton Gas Company contracts would prove to be of value. As the action of the Syndicate in advancing the

money prevented any default, Columbia was left with bonds and debentures which were no longer in a position to force a default or to control or govern a foreclosure. Columbia *then* purchased the stock control from the Syndicate and paid the Syndicate a handsome profit to obtain control of Inland and the other companies. (See Finding #13.)

Columbia did not purchase the Inland acreage as additional reserves for the Seaboard line. Mr. Weymouth, a Columbia Vice President (R. V, 2800) admitted this on cross-examination. He said:

> "Q. And so the Inland acreage wasn't acquired for the Seaboard Line, as I understand it? A. It wasn't acquired for that, no; not specifically, although it probably would have been used in the pot with all the rest of its gas supplies.
> "Q. I mean that there was a different purpose for its acquisition that you mentioned? A. Yes." (R. VI, 2840.)

As Columbia did not purchase the Inland acreage for gas reserves, then the only other reason why Columbia spent such a vast sum must have been to get control of Inland which was then taking and threatening to continue to take the "cream" of its business and which was in a position where it "could take all of our industrial business." (R. III, 1340.)

On October 30, 1930, Columbia entered into the contract with the Syndicate to obtain control. It not only agreed to make the payment giving the Syndicate members a substantial profit, but assumed many obligations including the contingent liability of Piney Oil & Gas Company and Hamilton Gas Company against Inland for failing to take the full amount of gas for which it was obligated. (R. III, 849.)

On November 6, 1930, Columbia nominees, consisting mainly of attorneys for Columbia, were placed on the In-

land board of directors and Columbia proceeded to treat Inland as one of its subsidiaries. On November 26, 1930, the attorneys were replaced by minor employees of a wholly owned Columbia subsidiary, Columbia Engineering and Management Corporation. (R. IV, 1532-33; Ex. M 5 to Ans. to Ints. #34, R. VIII, 866; Ans to Int. #35, R. VIII, 711.) Mr. Lockhart, the President of Inland, was continued, but it was understood that he was acting as an employee of Columbia. (Ans. to Int. #35, R. VIII, 711; R. IV, 1433; V, 2495.) Not only did Columbia cease all work on the Detroit project after November 6, 1930 (Reply to Requests to Admit #34 and #35, R. II, 380; R. III, 1287) which would have made a large market accessible to Inland for its excess gas and particularly for the gas it was obligated to take from Piney Oil & Gas Company and Hamilton Gas Company (R. IV, 1798), but Columbia stopped Inland from taking any new business, i. e., Inland was not to take any more of Columbia's customers. The best proof that Columbia instructed Mr. Lockhart not to let Inland expand further is shown in a letter from Mr. Lockhart to Mr. Pew, who was in charge of Columbia's natural gas activities. (R. IV, 1433.) On November 19, 1930, Mr. Lockhart wrote to Mr. Pew "You have said to me that you wanted us to take care of our business and carry on, but not to start anything new." (R. III, 739; IV, 1433.) That the instructions were carried out to the letter is shown by Cullman Exhibits 1-A, 1-B and 1-C. (R. VII, 1-3.) A copy of 1-A is annexed as Appendix "B" hereto. This shows how customers were being taken from Columbia until the time Columbia got control of Inland and that *then Inland stopped taking Columbia's customers.* None were taken after November 6, 1930. Curiously enough, some were taken again at a later period, but not until after the Federal Trade Commission conducted an inquiry concerning why Columbia permitted Inland to go into receivedship. (R. VI, 2853.) This exhibit (Cullman 1-A) shows definitely that Columbia did achieve its purpose of stopping Inland from taking its customers.

On November 25, 1930, *which was less than 3 weeks after the purchase,* the Columbia Executive Committee met and considered receivership for Inland. (R. III, 1364; IV, 1538, 1574-76.) Immediately thereafter Mr. Caldwell, the Ashland, Kentucky, attorney for Inland, and Mr. Lockhart, President, were summoned to New York by Columbia officials and were told it had been determined to place Inland in receivership. (R. II, 396-399; 498-499.) At that time Inland had no "pressing obligations" and no creditors who were in a position to file a receivership bill. (R. II, 500.) It was determined, however, that some creditors should be secured whereupon Messrs. Caldwell and Lockhart went back to Ashland to cause a "voluntary receivership." (R. II, 398-402.) An attorney was engaged to prepare a bill of complaint in which he named J. T. William and Miles Gibson as plaintiffs. He prepared it the afternoon of December 1, 1930. (R. II, 402.) *The named plaintiffs didn't know about it until after 8 o'clock that night.* (R. II, 408-409.) They were well drillers working for Inland, under a contract which would not entitle them to any payment whatsoever "until completion of said well". (Gibson Ex. No. 1, R. VII, 219.) The well they were drilling was about half completed and there was "nothing due" them. (R. II, 410.) They were summoned to Ashland on December 1, 1930, and arrived about 8 o'clock in the evening, at which time they were taken to the Inland office and were asked if they would execute the bill of complaint which had been prepared and which prayed that a receiver be appointed for Inland. (R. II, 408-415.) They objected to doing so, but were prevailed upon to execute it. Mr. Williams testified:

> "Q. Who said that? A. Well, I couldn't recall just which one it was, whether it was Mr. Lockhart or Mr. Caldwell.
>
> "Q. Well, then proceed to tell us what happened as best you can remember. A. Well, that was about

all. I know they just told us about it and wanted us to sign a paper there.

"Q. What did you say? A. I didn't understand it. I didn't want to sign it. I was afraid it would get us into trouble.

"Q. I didn't understand your answer. A. I said I didn't want to sign it. I was afraid it might get us into trouble, and I said that I would leave it up to Mr. Van Patten.

"He said, 'Better go ahead and sign it. If you go ahead and finish the well, you might not get paid for it. If you go ahead and finish the well, if it were in receivership first, you will get your money.'

"He said we would get our money." (R. II, 415.)

Before they did execute the bill of complaint, however, they asked about payment when the well was completed and were assured that upon completion of the well, they would be paid the full price. (R. II, 415.) With that promise they did execute the bill of complaint with its allegations that money was due and owing to them and that they had been pressing for payment. The bill was filed the night of December 1, 1930. *Prior* to the time the plaintiffs were asked to sign the bill of complaint a meeting of the Inland Board of Directors, composed of the Columbia employees, had been held in the Columbia offices in New York, at which a resolution was passed reciting that Williams and Gibson were creditors of Inland and were proposing to file a bill of complaint against Inland asking for the appointment of a receiver and resolving that a consent answer should be filed. (R. II, 553-556.) Such an answer was filed on the night of December 1, 1930. (R. II, 403.) Mr. Lockhart was appointed receiver on December 2, 1930. (R. II, 403.) That had been Columbia's desire. (R. II, 404; V, 2492.)

By December 22, 1930, Williams and Gibson had completed the well and then demanded full payment. They had to make several demands for payment (R. II, 412), and

"spoke very potently" (R. II, 469), whereupon a Columbia subsidiary, Warfield Natural Gas Company, paid them the full amount for drilling the well and took an assignment from them of the claim they had against Inland. (R. II, 413; 456-460.)

Mr. Sloan, local manager in Ashland, Ky., of Warfield, made the payment and took the receipt. Mr. Sloan testified that he made the payment pursuant to instructions from Judge Ritz, General Counsel of Warfield. (R. II, 456-460.) Sloan testified that he did not make any report about the receipt because "I said nothing to them because Mr. Caldwell told me to keep that receipt and to say nothing to no one about it." (R. II, 460.) Mr. Lockhart, as receiver of Inland and *without authority of the Court*, paid Warfield the $7418.85, which Warfield paid Williams and Gibson. (R. II, 456-460.) The true facts were concealed on the Inland books. (R. II, 515-516.)

Columbia caused Kentucky Fuel to be placed in receivership the same day under somewhat similar circumstances in that Columbia took a dubious claim in the sum of $9,000, which it had acquired from the Syndicate in connection with the purchase, and assigned it for no consideration to American Rolling Mills and then had American Rolling Mills execute a bill of complaint. (R. II, 500-501.) Again we find the Board, consisting of Columbia's same nominees passing resolutions reciting that American Rolling Mills proposed to file a bill of complaint for its debt and providing that a consent answer should be filed. (R. II, 563-565.)

The District Court found that Columbia's actions in placing Inland and Kentucky Fuel in receivership "resulted in immediate discontinuance of all efforts to promote the Detroit project, and in curtailment of further extension of the subsisting competition between the subsidiaries of Columbia and American Fuel." (Finding #13.)

Before the receivers were appointed, Columbia took steps to have a bondholder committee organized for both

Inland and Kentucky Fuel.[4] (Reply to Request to Admit #48, R. II, 524; R. III, 1298-99). Columbia deposited its bonds under different deposit agreements than the ones the committee used for the deposit of public held bonds. Columbia's deposit of Inland bonds was made in order to keep the Vanston Committee going and in a manner whereby Columbia could still control any proposed sale in the reorganization. (R. III, 1301.)

After the receivership Mr. Lockhart continued to report regularly to Columbia. At the trial numerous letters, most of which were written by Lockhart to Columbia officials were introduced. (R. II, 566-599, 602-621; III, 731-748, 765-814, 894-907.) These letters show clearly that Lockhart, who was an employee of Columbia with respect to the other companies not in receivership, made no distinction with respect to his position as receiver of Inland. He was subservient to Columbia in all matters and apparently acted as they wanted and instructed him to do. He refused to sell gas at less than 25¢ per mcf as he had been instructed. (See letters, R. II, 612, 615, 619; III, 894-895.) The letter appearing in Volume III, at page 894, shows that Columbia had become concerned over a report that he had made a contract to sell gas "at a cut rate." He wrote to Mr. Pew, a Columbia Vice-President, on September 25, 1931, and said:

> "I am glad to relieve any anxiety you may have on this score by telling you that we have not taken this business at a cut rate." (R. III, 894.)

The last paragraph of the letter reads:

> "I want to say in conclusion that we have neither taken nor solicited any business at anything less than our standard rate of twenty-five cents since the conversa-

[4] This committee is the Vanston Committee, which did not object to the Columbia claims and is not the Van Horn Committee which is an Appellee here.

tion you and I had in my office last December." (R. III, 894-895.)

Not only did Lockhart refuse to cut rates but he advised Columbia regularly concerning any rumors or facts indicating that upon a foresclosure sale of the Inland properties Columbia would have competition. (See R. II, 590, 591, 592, 594, 602-605, 607, 609, 613; III, 777, 801, 901, 902, 904, 905. He even took trips to trace rumors to their source. (R. II, 607.)

Lockhart advised Columbia concerning any threats of litigation arising by virtue of the facts that Columbia had put Inland in receivership. (R. II, 566-68, 570-76, 613, 617; III, 731, 734, 797, 906.) He asked Columbia if he could take on new business (R. II, 605-606, 616.) He sent Columbia a list of Inland's contracts and customers. (R. III, 740.) He offered to work together to get new customers for Inland or Columbia, as Columbia desired. (R. II, 616.) He gave Columbia a statement of the Inland acreage he surrendered. (R. III, 906-908.) He promised Columbia he would not try to extend the Inland pipe lines to the Portsmouth market. (R. III, 898.) In addition he turned to Columbia regularly for instructions. (R. II, 569, 587, 588, 589, 593, 618; III, 735, 737, 738, 739, 747, 776, 780, 783, 812, 813.)

On or about November 18, 1931, Warfield Natural Gas Company, a wholly owned subsidiary of Columbia, entered into contracts with Piney Oil & Gas Company and Hamilton Gas Company respectively in which it was recited that Warfield proposed to buy the Inland properties at a foreclosure sale. The contracts then provide that in the event Warfield or an affiliated or associated company became the owner of the pipe lines of Inland, the gas requirements of said pipe lines, as defined in said agreements, would be supplied on the basis of Piney Oil & Gas Company delivering natural gas produced from certain lands and leases up to 38% of said requirements and Hamilton Gas Company delivering natural gas produced from certain lands and leases

up to 25% of said requirements. There was no provision stating that Inland itself would supply any amount of said requirements. (Ex. K. to Ans. to Int. #29, R. VIII, 826-853; Larner Exhibit No. 2, R. VII, 414). These contracts not only provide that the gas requirements of Inland shall be supplied in part by Piney Oil & Gas Company and Hamilton Gas Company and apparently the balance from either Inland's properties or Warfield's, but list the customers of Inland which in the main were customers Inland had taken from Columbia prior to Columbia's acquisition of control. The customer's so listed constituted the market controlled by Inland which Columbia was proposing to divide up. These two contracts show that Columbia intended to acquire the physical properties of Inland and its markets and "get back" the customers Inland had taken from it and then serve them in such a manner as it saw fit. (R. VI, 2850.) Not only did Columbia enter into the two contracts just referred to with Piney Oil & Gas Company and Hamilton Gas Company, but entered into two others which gave Columbia control of all the gas production of said two companies and thus prevented any competitor at a foreclosure sale from being able to put itself in position to get these gas reserves for Inland. (See testimony of Thomas R. Weymouth, R. V, 2804 to VI, 2840.) That Columbia had intended at all times to get control of Inland's physical assets is not only demonstrated in the two contracts referred to above, but in Mr. Weymouth's testimony. He stated, inter alia:

> "A. I have no recollection of a discussion among ourselves in the Columbia group as to why we should do this, except that it was the general spirit there that they wanted to maintain the assets of the Inland Company if possible and preserve them *against the day when Columbia might become the owner of them.*" (R. VI, 2827.)

Columbia's action, after obtaining control of Inland on November 6, 1930, was to prevent it from taking on any

new business, to place it in receivership and then enter into contracts as to the method Inland's customers would be served after Columbia acquired control of the physical properties at a foreclosure sale. *That was one of Columbia's alternatives.* It was the alternative leading to Inland's destruction. The other alternative was to save Inland. Inland had gas and its success depended upon getting additional markets. Its gas purchase contracts were valuable if it was able to find markets. Inland could have earned its interest charges so that receivership would not have been necessary if it had had a large customer. COLUMBIA COULD HAVE BEEN THAT CUSTOMER. (R. III, 1338; IV, 1482-83.) If Columbia had desired to do so, it could have bought gas from Inland and saved it, and at the same time saved its own gas production for the Seaboard line. Mr. Reynolds testified:

> "Q. I mean, if you wanted to save them you could have bought gas and done so? A. Could have done it in that sense, yes, could have been done.
> "Q. But you elected not to do so? A. Certainly; we had additional obligations. Once it was taken by us it meant that we had to cut back other gas that we were buying or producing and for which we were making payments to other people for leases, rentals, etc.
> "Q. But you would have to shut down on your own wells? A. Yes, shut down what we were producing.
> "Q. Were you not trying to conserve the other wells at that time? Would it not have been a point of policy if you had cut down your production and saved it for the eastern (Seaboard) lines? A. It may have been that other policies could have been followed. I have told you what ours were.
> "Q. If you had purchased those properties only for the gas at that time you could have taken the gas out and saved gas in your own wells in other parts of Kentucky and West Virginia and used it later, could you

not? A. That is a possibility, yes." (R. IV, 1483-84.)

Although Columbia purchased with full knowledge of Inland's financial condition (Finding #9), Columbia did not even consider purchasing gas from Inland in order to allow it to earn enough to meet the interest on its bonds. (R. IV, 1482.)

Columbia not only failed and refused to take any Inland gas for the Seaboard line, but would not even take gas into its system and thus save its own gas production as additional reserves for the Seaboard line, when to do so would have given it the additional gas it claims it then needed, *and would have saved Inland.*

Not only did Columbia refuse to save Inland, but refused after the receivership to aid Inland. (R. II, 470; III, 776-777, 897). *The competitive advantage Inland had enjoyed ended with receivership because then the Receiver was not in a position to offer industry long term contracts or finance expansion.* (R. II, 470.) With the threat of foreclosure and sale of the physical properties definite assurances concerning the future could not be given. Mr. Lockhart ran into this situation early in the receivership and sought to enlist Columbia's aid to the extent of having Columbia declare that if it purchased the physical properties at a foreclosure sale it would carry out contracts made by the Receiver. This would have made it possible for Lockhart to have at least kept the customers Inland then had. See letter from Lockhart to Columbia imploring it to at least render this slight aid. (R. II, 605-606). Columbia recited its intention to buy in the Piney Oil & Gas Company and Hamilton Gas Company contracts, but would not aid the Receiver.

Although Inland stopped taking customers from Columbia after Columbia obtained control, and after receivership could not offer industrial customers long term contracts, it did earn in one year (1941) $29,795.08 over all fixed charges. What Inland might have earned, but for

Columbia's actions the District Court found to be speculative. (Finding #15.) In connection with that speculation the fact is that Inland's gross income was rising rapidly before Columbia acquired control. In 1928 the gross income showed a *loss* of $89,790.28. In 1929 the gross income showed a *gain* of $15,053.72, or a total gain in 1929 over 1928 of $104,844.00. In 1930 the gross income showed a *gain* of $93,284.80, which represented a gain over 1929 of $78,231.08, and a total gain for the two years of $183,075.08 over 1928. The pipe line was not completed until the Fall of 1928. In the two years of operation of the pipe line free from Columbia control, the income was on a rapid rise. The following year (1931) the income fell to a *loss* of $34,934.64 which was $128,219.44 less than in 1930. (Grayburn Ex. 3, Ex. Vol. IV, 810; Cullman Ex. B, C, & D, Ex. Vol. 1, 61-63.)

QUESTION PRESENTED.

The "Question Presented" by Columbia in its Petition, page 20, and the arguments in support thereof contained in the Brief in Support of Petition are interesting, but not applicable to the facts in this cause.

ARGUMENT.

I. Summary of Argument.

The Petition for a Writ of Certiorari should be denied because the judgments of the Courts below are merely that as Columbia appeared in the bankruptcy proceedings below in the role of a claimant seeking affirmative relief, i. e., that its claims on bonds and debentures be allowed, and as the District Court, sitting as a Court of Equity, found that Columbia was in Court with unclean hands, in that it acquired and used its claims illegally and inequitably to the detriment and injury of the bankrupt and its other creditors, the Court should refuse to lend its aid to Columbia, or at least refuse, through the technique of subordination, to allow Columbia to have the same standing as innocent claimants.[5]

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[5] This court determined such action is a proper function of a bankruptcy court in the case of *Prudence Realization Corp. v. Geist,* 316 U. S. 89, 86 L. ed. 1293, where the Court said:

> "The court of bankruptcy is a court of equity to which the judicial administration of the bankrupt's estate is committed, Securities & Exch. Commission v. United States Realty & Improv. Co. 310 U. S. 434, 455-457, 84 L. ed. 1293, 1303-1305, 60 S. Ct. 1044, 42 Am. Bankr Rep(NS) 602, and it is for that court—not without appropriate regard for rights acquired under rules of state law—to define and apply federal law in determining the extent to which the inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy requires its subordination to other claims which, in other respects, are of the same class. Cf. Taylor v. Standard Gas & E. Co., 306 U. S. 307, 83 L. ed. 669, 59 S. Ct. 543, 38 Am. Bankr Rep(NS) 692, supra; Pepper v. Litton, 308 U. S. 295, 84 L. ed. 281, 60 S. Ct. 238, 41 Am. Bankr Rep(NS) 279, supra."

II. The "Question Presented" by Columbia is Not in This Case.

In its Petition for Writ of Certiorari Columbia states the single question to be:

> "Whether in bankruptcy proceedings a creditor who has paid fair value shall, upon a finding that in acquiring the credit he violated the anti-trust laws, be subordinated to other creditors?"

This question ignores the nature of the proceedings below. The proceedings in the District Court in this cause are proceedings under the Bankruptcy Act for the reorganization of Inland Gas Corporation. In those proceedings Columbia filed claims on its bonds, debentures and general, unsecured claims, and sought to have the same allowed. (R. I, 358-359, 466-467.) The Van Horn Committee filed a Petition setting forth that said claims had been acquired and used in violation of the anti-trust laws and that Columbia had, through its inequitable conduct, caused Inland severe injury and damage. (R. I, 358-408.) Columbia filed its Answer to said Petition. (R. I, 466-496.) In and by its Answer Columbia prayed that the Van Horn Committee Petition be dismissed and that "its claims against the debtor Inland Gas Corporation be accorded full recognition." (R. I, 496.) Thus the issue was sharply drawn as to whether or not Columbia's claims were illegally acquired and used and whether or not Columbia's conduct had been inequitable and to the detriment and injury of Inland. The District Court found the numerous facts contained in its Findings. See Appendix "A". The District Court also made certain conclusions of law in which it found the following principles were applicable and controlling, inter alia:

> "Equity will not permit one to rely on his wrongful act as against those affected by it, but not participating therein, to support his own asserted legal title."

* * *

"Under the facts in this record no principle of equity, morals or law requires the court to approve the present claims or stock interests of the Columbia and this court should not lend its aid to further a scheme abhorrent to all recognized rules of right and justice as the facts here show." (R. I, 602.)

Columbia's question ignores (1) the fact that the violation of the anti-trust laws directly affected Inland; (2) that Inland was injured and damaged by Columbia's violations of the anti-trust laws; and (3) that Columbia's inequitable conduct, entirely separate and apart from the violations of the anti-trust laws, caused injury and damage to Inland and its innocent security holders.

III. Columbia's Point I, That "The Judgment of the Court Below Was Erroneous Because it Inflicted a Penalty Upon Columbia Which is Not Prescribed by the Federal Anti-Trust Statutes", is Not Applicable, Because What the Court Did Below Was Simply to Apply the Unclean Hands Doctrine After Finding That Columbia Had Acted Illegally and Inequitably With Respect to the Matter in Controversy.

Columbia's Point I in support of the question it seeks to present ignores the nature of the proceedings below. The same point was strenuously urged before the District Court and before the Circuit Court of Appeals. In its Opinion the Circuit Court of Appeals answers it completely, viz.:

"The argument that the court, for alleged violations of the Anti-Trust Laws, imposed in a bankruptcy proceedings penalties other than those specified in the Anti-Trust Statutes, must be rejected. The court imposed no penalties; it but exercised its equity power to deny relief to a creditor seeking enforcement of contracts entered into illegally or tainted with inequity. To apply the doctrine so vigorously urged by Columbia,

is to deny the power and duty of equity, to reject demands arising out of illegal or inequitable conduct whenever such conduct is subject to legal penalties imposed by state or federal law, and so to limit it to that narrowly restricted field in which the chancellor may sense inequity even in the absence of statutory condemnation. A denial of this contention does not mean, of course, that the power may be invoked in respect to conduct constituting no wrong to the parties or interests in litigation." (R. IX, 21.)

The Circuit Court of Appeals also answered Columbia's contention that the decision conflicts with the decision of this Court in the *Hartford-Empire Co.* case, viz.:

"In our view, Columbia receives no support from the case of *Hartford-Empire Co. v. U. S.*, 323 U. S. 386, wherein it was held that the use of patent positions to allocate fields of manufacture and to maintain prices, violated the Anti-Trust Laws and could be restrained, but that the court was without power to compel action, which amounts to a forfeiture of patents. Columbia correctly points out that there is no distinction between a patent and a bond; both are a species of property and neither can be confiscated because of past uses. But its contention in other respects ignores the fundamental basis of the *Hartford-Empire* decision which, in line with *Morton Salt v. Suppiger* and *B. B. Chemical Co. v. Ellis*, supra, denies enforcement of patent rights against infringers, so long as the patent owner is using his patent in violation of the Anti-Trust Laws. It may well be, under the facts of the *Hartford-Empire* case, that there remained to the appellants there, property rights which, when their owners had abandoned their illegal use and been purged of inequity, could still be enforced against subsequent infringers. Such rights the court would not allow to be confiscated. This doctrine has no application to the present status of Colum-

bia, at least in respect to the subordination of its claims by the decree. In that respect the decree merely denies enforcement of the Columbia claims precisely as the *Hartford-Empire* decision denies enforcement of patents illegally used against those infringing during such illegal use. The fruits of Columbia's inequitable activities are still retained in its freedom from competition by American Fuel, and Columbia's suggested remedy would still leave wronged stockholders and creditors without relief, for a restoration of the *status quo ante* is manifestly now impossible." (R. IX, 21-22.)

In other words, as the Circuit Court of Appeals pointed out, what was done in this case was to deny to Columbia the affirmative relief it was seeking because it was in Court with unclean hands with respect to the matter in controversy. The Circuit Court recognized that the proceedings were not proceedings against Columbia seeking any affirmative relief and certainly not proceedings against Columbia to enforce any penalties or to seek confiscation of its property. Columbia does not want to recognize the true nature of these proceedings. All of the other cases cited by Columbia under its Point I, except possibly that of *Standard Oil Co. v. Markham*, 61 F. Supp. 813, are of the same kind, and differ from the instant case on this very point which involves the nature of equitable jurisdiction. Equity is unable in many situations to grant affirmative relief against a wrongdoer, but when that wrongdoer comes into Court seeking the aid of Equity, and the wrong which he has done is connected with the matter in controversy, the Court can deny him relief. *Precision Instr. Mfg. Co. v. Automatic M. Mach. Co.*, 324 U. S. 806, at 814, 89 L. ed. 1381, at 1386.

The case of *Standard Oil Co. v Markham*, 61 F. Supp. 813, is inapplicable as it merely illustrates a limitation upon the principle that one who seeks affirmative relief must not come into Court with unclean hands, which is stated in 2 *Pomeroy, Eq. Jur.*, § 399, as follows:

"The maxim, considered as a general rule controlling the administration of equitable relief in particular controversies, is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties, and arising out of the transaction; it does not extend to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party has no concern. When a court of equity is appealed to for relief it will not go outside of the subject-matter of the controversy, and make its interference to depend upon the character and conduct of the moving party in no way affecting the equitable right which he asserts against the defendant, or the relief which he demands."

That it was the intention of the District Court in the *Standard Oil Co.* case to apply this rule is found not only in the distinction which the Court draws between cases where the illegal act was connected with the matter in controversy and where the illegal act was not,[6] but also in the Court's specific reference to the fact in the original opinion that the plaintiffs were no longer involved in anti-trust activities in connection with the subject matter, and hence the Alien Property Custodian could not urge a prior violation of law as a defense. Upon reconsideration the Court specifically pointed out this distinction by stating that there was no longer any law violation involved and that the rights

[6] The District Court said the case was quite unlike that of *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U. S. 227, 53 L. ed. 486, where this Court said it would not lend its aid to a plaintiff where an anti-trust violation was found to be connected with the matter in controversy. The District Court then said that the distinction between such a case and one where the illegal act was not connected with the matter in controversy was "too familiar to require elaboration. See A. B. Small Co. v. Lamborn & Co., * * *." 267 U. S. 248, 69 L. ed. 597.

being asserted, if granted, would not aid in "the current carrying out of an unlawful plan." Furthermore, the Court held definitely that the prior illegal acts were not connected with the matter in controversy. The Court said that what was at issue was the status of property and "When a question of the status of property rights is at issue an inquiry as to whether the status was acquired in violation of a statute is irrelevant and collateral unless the statute otherwise provides."

In the instant case the status of Columbia's claims is not as issue, but what is at issue is whether Columbia can participate in any proposed reorganization on a parity with innocent claims. Columbia brought about the receivership which later materialized into the reorganization proceedings. (R. I, 116, 120.) That its illegal acts in acquiring and using the claims are relevant and not collateral, and that if Columbia is allowed to participate on a parity with others, Columbia could carry out its original unlawful plan, becomes evident from a consideration of exactly what Columbia has.

Inland has outstanding $4,254,700 principal amount of its bonds. (R. I, 178.) Columbia's total purchases were $1,596,600. (R. I, 358, 527.) This gave Columbia a total of 37.52+% of the outstanding bonds.

The proceedings below are under the corporate reorganization provisions of the Bankruptcy Act. (11 U. S. C. A. 501-676.) In order to have any plan of reorganization confirmed by the Court, two-thirds in amount of the claims filed and allowed of each class, with certain exceptions, would have to accept the plan. (11 U. S. C. A. 579 and 621.) [7]

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[7] The pertinent provisions of these two sections are as follows:

§ 579. Acceptance of Plan; Hearing for Confirmation

After a plan has been accepted in writing, filed in court, by or on behalf of creditors holding two-thirds in

This means that if Columbia's bonds participate, *it will continue to have power to govern any reorganization of Inland.* Columbia's purchases were made in sufficient amounts to give it the power to control and govern any plan of reorganization. The total of 37.52+% was Columbia's idea of the amount needed. If Columbia's bonds are allowed, Columbia could block the confirmation of any plan and thereby continue Inland in trusteeship or force its liquidation through the Bankruptcy Act. (11 U. S. C. A. 636.) [8]

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amount of the claims filed and allowed of each class, and, if the debtor has not been found to be insolvent, by or on behalf of stockholders holding the majority of stock, of which proofs have been filed and allowed, of each class, exclusive of creditors or stockholders or of any class of them who are not affected by the plan or whose claims or stock are disqualified pursuant to section 603 of this title, or for whom payment or protection has been provided as prescribed in paragraphs (7) and (8) of section 616 of this title, the judge shall fix a hearing, upon notice to the debtor, creditors, stockholders, indenture trustees, the Secretary of the Treasury, the Securities and Exchange Commission, and such other persons as the judge may designate, for the consideration of the firmation of the plan and of such objections as may be made to the confirmation. July 1, 1898, c. 541, § 179, as added June 22, 1938, c. 575, § 1, 52 Stat. 892.

§ 621. Confirmation by Court

The judge shall confirm a plan if satisfied that—

(3) the proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by this title.

[8] The pertinent provisions of this section are as follows:

§ 636. Failure to Effectuate Plan or Consummation

If no plan is proposed within the time fixed or extended by the judge, or if no plan proposed is approved by the judge and no further time is granted for the proposal of a plan, or if no plan approved by the judge is accepted within the time fixed or extended by the judge, or if confirmation of the plan is refused, or if a confirmed plan is not consummated, the judge shall—

Columbia still stands by with bonds it would have this court validate which are sufficient in amount to govern and control the final disposition of the Inland properties. *It secured these for that purpose and would now have this court hold that it can consummate the conspiracy through these securities.*

Columbia put Inland in receivership to eliminate the completion and has stood by with sufficient bonds since 1930 to prevent any reorganization not to Columbia's liking. Certainly the doctrine of unclean hands was correctly applied by the courts below in refusing, as the District Court said, "to lend its aid to further a scheme abhorrent to all recognized rules of right and justice as the facts here show."

The maxim which, we submit, applies and was correctly applied has recently been commented upon by this Court in language most apt and most decisive in these proceedings. In the case of *Precision Instr. Mfg. Co. v. Automatic M. Mach. Co.*, 324 U. S. 806, 89 L. ed. 1381, this Court said, at page 1386:

> "The guiding doctrine in this case is the equitable maxim that 'he who comes into equity must come with clean hands.' This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been

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(2) Where the petition was filed under section 528 of this title, after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this title, or dismissing the proceeding under this chapter, as in the opinion of the judge may be in the interests of the creditors and stockholders. July 1, 1898, c. 541, § 236, as added June 22, 1938, c. 575, § 1, 52 Stat. 899.

the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity.' Bein v. Heath, 6 How (U. S.) 228, 247, 12 L. ed. 416, 424. Thus while equity does not demand that its suitors shall have led blameless lives,' Loughran v. Loughran, 292 U. S. 216, 229, 78 L. ed. 1219, 1226, 54 S. Ct. 684, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue. Keystone Driller Co. v. General Excavator Co., 290 U. S. 240, 245, 78 L. ed. 293, 296, 54 S. Ct. 146; Johnson v. Yellow Cab Transit Co., 321 U. S. 383, 387, 88 L. ed. 814, 818, 64 S. Ct. 622; 2 Pomeroy, Equity Jurisprudence, 5th ed. §§ 397-399.

"This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is 'not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.' Keystone Driller Co. v. General Excavator Co. supra (290 U. S. 245, 246, 78 L. ed. 296, 297, 54 S. Ct. 146). Accordingly one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor.

"Moreover, where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoy-

ing the fruits of his transgression but averts an injury to the public. The determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance. See Morton Salt Co. v. G. S. Suppiger Co., 314 U. S. 488, 492-494, 86 L. ed. 363, 365, 367, 62 S Ct. 402."

In *Deweese v. Reinhard,* 165 U. S. 386, 17 S. Ct. 340, 341, 41 L. ed. 757, this Court said:

> "A court of equity acts only when and as conscience commands; and, if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses, and whatever use he may make of them in a court of law, he will be held remediless in a court of equity."

As the judgments of the two Courts below were that since Columbia's acts violated the law and were inequitable with respect to the matter in controversy, it could not participate on an equal footing with innocent creditors, the Courts below merely applied the unclean hands doctrine and there is no reason why their judgments should be reviewed by this Court, and none of the reasons relied on by Columbia for the allowance of the writ, as set forth on page 20 of its Petition, are applicable.

IV. Re: Columbia's Point II, That "The Penalty Imposed Below, in the Absence of Injury to the Interests of Other Security Holders Resulting From Columbia's Purchase of American Fuel Securities, Was Beyond the General Equity Powers of the Court."

Again we find that Columbia is reluctant to admit the essential nature of the action taken by the Courts below. No penalty was imposed below as Columbia urges, but instead, as we pointed out above, the Courts merely refused the prayer of Columbia's Answer that "its claims against the debtor Inland Gas Corporation be accorded full recognition." (R. I, 496.)

However, the complete answer to Columbia's Point II is that injury *was* inflicted upon Inland and its innocent security holders.

Although the record shows that Inland and its innocent security holders were injured, we submit that even if no injury had occurred or could be shown to have been inflicted upon Inland or its innocent security holders, nevertheless the Courts below were justified in refusing to lend their aid to Columbia. In *Precision Instr. Mfg. Co. v. Automatic M. Mach. Co.*, 324 U. S. 806, at 814, 89 L. ed. 1381, at 1386, this Court pointed out that in applying the unclean hands doctrine it is the plaintiff's conduct and not the defendant's status which governs. This Court said:

> "This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant."

In *Bell & Howell Co. v. Bliss*, 262 Fed. 131, at 135, the Court said:

> "The complainant, entering a court of equity, must come with clean hands. Nor is this court, as argued by counsel for appellees, limited, in applying this maxim, to a case where the iniquitous action is one of which the moving party may personally complain. The rule thus invoked need not be pleaded at all. In fact, it is not a matter of defense primarily. Courts apply it, not to favor a defendant, but because of the interest of the public; courts act sponte sua. 10 R. C. L. 390; Memphis Keeley Institute v. Leslie E. Keeley, 155 Fed. 964, 84 C. C. A. 112, 16 L. R. A. (N. S.) 921; Weeghman et al. v. Killifer et al., 215 Fed. 289, 131 C. C. A. 558, L. R. A. 1915A, 820; Larscheid v. Kittell, 142 Wis. 172, 125 N. W. 442, 20 Ann. Cas. 576."

In *Sharpless-Hendler Ice Cream Co. v. Davis,* 17 Del. Ch. 161, 151 A. 261, at 262, the Court said:

> "It is not essential that the party in whose favor the rule of the maxim will operate must be one who is himself entitled to complain, for the rule is not one of defense and need not be pleaded. Bell & Howell Co. v. Bliss (C. C. A.) 262 F. 131. It is a rule that lays restrictions upon complainants, and tells them that an appeal for relief to a court of conscience will not be honored by one who has himself been guilty of unconscionable conduct. It was in harmony with this view that the case of Rentoul v. Sweeney, 15 Del. Ch. 302, 137 A. 74, was decided holding that one who had conveyed land for the purpose of defrauding a creditor had no standing in equity to secure a reconveyance, a sort of case in which it is manifest that the maxim's application could in no sense be said to operate in response to an assertable complaint on the part of the defendant."

The most familiar type of case in which the maxim is applied, although the inequitable conduct cannot be shown to have injured the defendant, is, as the Delaware Chancellor pointed out, where a plaintiff has transferred property to a defendant, without consideration, in order to hide the property from his creditors, and then the plaintiff sues to impress a trust on the property, after the danger from his creditors has passed. The Courts uniformly refuse to lend aid although, of course, plaintiff's act in making the transfer did not injure the defendant. See numerous cases collected at 4 *A. L. R.* 100-101.

We recognize, however, that many Courts have said that injury to the defendant must be shown before the maxim is applicable. The Circuit Court of Appeals below recognized this latter view, saying:

> "To sustain the judgment below the appellees must have proved not only inequitable or illegal conduct, but

that the debtors, their stockholders or public creditors were injured thereby." (R. IX, 15.)

After adopting the view that the bankrupts or their public creditors must have been injured in order for the maxim to apply, the Circuit Court reviewed the record and came to the conclusion that Columbia's acts had injured the bankrupts and their creditors other than Columbia. (R. IX, 20-21.) The Circuit Court's opinion deals with the three companies, not specifically with Inland, in its conclusion that all of the three companies and their innocent creditors were injured. That the Circuit Court was right, particularly with respect to Inland and its innocent creditors, is apparent from the following:

A. *The Findings of the District Court, Which Columbia Does Not Challenge, Show Injury to Inland and Its Innocent Creditors.*

Finding #6 shows that Inland had a competitive advantage over the Columbia subsidiaries. Finding #7 shows that Columbia determined to inaugurate measures to combat Inland's competition. Finding #10 shows the organization of a syndicate having for its purpose the securing of capital to bridge over the financial difficulties encountered by 1930 and "to finance a large expansion of its business." This Finding also shows that the large expansion of business called for the building of a natural gas pipe line to Detroit. This Finding then shows that:

> "This syndicate constituted a sufficient combination of financial strength and business experience to foreshadow success of the proposed plans and thereby prevent the impending financial collapse of the American Fuel System as anticipated by Columbia."

Finding #12 shows that Columbia, realizing its own plans were "seriously threatened by the plans of the syndicate," covertly bought Inland bonds until it gained "a command-

ing position." Finding #13 shows that Columbia purchased stock control of Inland and by use of certain claims "promptly precipitated receivership proceedings against Inland * * * which resulted in having them (it) placed in the hands of Columbia's nominee, W. E. Lockhart, as receiver. This resulted in immediate discontinuance of all efforts to promote the Detroit project, and *in curtailment of further extension of the subsisting competition between the subsidiaries of Columbia and American Fuel.*" (Italics supplied.) Finding #15 states, inter alia:

> "But for the consummation of this transaction, the Syndicate was ready, able and willing to continue its efforts to develop the project. Whether it would have ultimately succeeded is a matter which lies entirely in the realm of speculation." (R. I, 600.)

Finding #17 reads:

> "On and prior to January 1, 1930, and continuing throughout the year 1930 and thereafter, Columbia, together with its executive officers, directors and certain of its corporate subsidiaries, was engaged in a conspiracy, the object, purpose and effect of which was to restrain and monopolize trade and commerce in natural gas in and between the states of Kentucky, Ohio, West Virginia, Indiana and Michigan, and the claims herein presented and asserted by and on behalf of Columbia against the debtors, American Fuel, Inland and Kentucky Fuel, were acquired pursuant to and in accomplishment of the aims and purposes of that conspiracy. Any plans to acquire and utilize the properties of the American Fuel System as a legitimate adjunct to the Columbia System were merely collateral and incidental to the main purpose of the conspiracy to restrain actual and potential interstate competition in the production, transportation, distribution and sale of natural gas."

Based upon the foregoing Findings the District Court concluded the anti-trust laws had been violated and that

"Equity will not permit one to rely on his wrongful act *as against those affected by it,* but not participating therein, to support his own asserted legal title." (R. I, 602.)

From the foregoing, we submit, the District Court found injury to Inland. It found that Inland had a competitive advantage over Columbia's subsidiaries, which Columbia determined to combat and terminate; that a syndicate came forward to finance Inland through the early stages. The Finding that Inland had a competitive advantage and was expanding at Columbia's expense implies that with the Syndicate's financial aid Inland might have become prosperous. The Findings then show that through Columbia's purchases it was successful in causing the discontinuance of the Detroit project, which would have aided Inland in giving Inland an additional market for its gas, but, what is more important, the Finding is specific that the acquisition by Columbia of Inland's securities and Columbia's act in placing Inland in receivership resulted "in curtailment of further extension of the subsisting competition between the subsidiaries of Columbia and American Fuel" (Inland). This is a definite finding that Columbia stopped Inland from extending its business and implies as a finding that Columbia stopped Inland from becoming prosperous. The Finding that the Detroit project was speculative but was terminated by Columbia is one which shows that Columbia destroyed the opportunity for Inland to become prosperous through the sale of gas in connection with the Detroit project. Finally, Finding #17 is one showing definite injury to Inland in that it is a finding that Columbia conspired "to restrain and monopolize trade and commerce in natural gas" in Inland's territory. This of course means that Columbia was seeking illegally to prevent Inland from selling natural gas. And then we have the District Court's statement that the wrongful acts were against those affected, which of course is a conclusion, really of fact, more than of law, that Columbia's wrongful acts adversely affected Inland.

Columbia's tenuous argument that because the District Court did not make a specific finding of injury, it made no finding of injury to Inland, is refuted by the above, we submit.

The Circuit Court of Appeals reviewed the entire record and concluded that Inland and its innocent creditors were injured and adversely affected by Columbia's wrongful acts. (R. IX, 20-21.) Such conclusion is further answer to Columbia's position.

B. *The Undisputed Facts in the Record Upon Which the Court's Broad, General Findings Were Based, Show the Detail of the Injury to Inland and Its Innocent Creditors.*

Cullman Exhibit 1-A (Appendix "B" hereto), probably demonstrates better than anything else in the record the extent to which Columbia's actions injured Inland and its innocent security holders. This shows that in the short period of Inland's existence prior to 1930, when it had the competitive advantage over Columbia's subsidiaries, it and its associates took 38 industrial customers, whose total annual gas consumption was 5,926,778 mcf., away from Columbia. Additional customers were taken prior to November 6, 1930, when Columbia's nominees were placed upon the Boards of Inland and its associates. From the date Columbia's nominees assumed control of Inland and its associates, and for a period of four years thereafter, *not a single customer was taken by Inland* or any of its associates from Columbia's subsidiaries. This Exhibit demonstrates that the District Court's Finding that Columbia's actions resulted "in curtailment of further extension of the subsisting competition between the subsidiaries of Columbia and American Fuel" is a mild understatement.

As pointed out supra, p. 17, the competitive advantage which Inland enjoyed ended with the appointment of receivers. Let us look then to see whether this loss of a competitive position cannot be attributed solely to Colum-

bia, and thus show that Columbia injured Inland and its innocent security holders by taking away from Inland the competitive advantage which it had and which would have enabled it to take all of Columbia's industrial customers. See supra, p. 5. When Columbia obtained stock control of Inland, Inland had no "pressing obligations" *and no creditors were in a position to file a receivership Bill.* (R. II, 500.) We have set forth in detail the corrupt and illegal manner used by Columbia to have receivers appointed for Inland. See supra, pp. 10 to 12. We thus find that Columbia wrongfully and corruptly took steps to put Inland in receivership, which injured Inland, and, of course, bondholders of a corporation improperly placed in receivership certainly suffer injury. Furthermore, as pointed out above, supra, pp. 25 to 27, Columbia has been in a position since 1930 to control and govern any reorganization. Again injury to bondholders is apparent. Again we say that the District Court used mild language when it concluded that Inland was "affected" by Columbia's wrongful acts.

In 1930, when Columbia determined to obtain a commanding position over Inland through the purchase of its securities, Inland, although not earning its bond interest, was making financial progress. Its gross income increased $104,844 in 1929 over 1928 and $78,231.08 in 1930 over 1929, or a total of $183,075.08 in the two-year period after the pipe line was completed. It had no "pressing obligations" at the time Columbia put it into receivership. (R. II, 500, 514-520; IV, 1571.) In 1931 Inland's income was $128,-219.44 *less* than in 1930. The upward curve turned downward after Columbia bought control. *Columbia cannot escape from the import of the reversal of income after it obtained control.* Not only was Inland making financial progress through its competitive advantage over Columbia, which enabled it to take Columbia's customers and gave it hope of taking all of Columbia's industrial customers, but it had a financial angel in the Syndicate. As the District

Court found, the Syndicate was formed to secure capital to bridge over the immediate difficulties and the Syndicate had sufficient strength to foreshadow success and prevent any impending financial collapse. In other words, Inland was small, but struggling upward and had every reason to look forward to a successful future. COLUMBIA ENDED THAT. Now Columbia naively urges that it didn't hurt Inland or its innocent security holders.

The future Inland would have enjoyed after 1930, but for Columbia's activities, cannot be recast. The record shows that a situation has resulted wherein Inland's asset value is not now equal to the outstanding bonds, meaning that all security holders have been injured. The instant situation is almost exactly as that found by this Court in *Taylor v. Standard Gas & Electric Company*, 306 U. S. 307, 83 L. ed. 669 (the Deep Rock case), where the contention was made that, as the amount of the debt which Standard offered to make the basis of its claim in compromise represented items, after eliminations, which could not be questioned and which involved no wrongdoing, none of the preferred stockholders would be injured. This Court said:

> "It is impossible to recast Deep Rock's history and experience so as even to approximate what would be its financial condition at this day had it been adequately capitalized and independently managed and had its fiscal affairs been conducted with an eye single to its own interests."
>
> (306 U. S. 307 at 323, 83 L. ed. 669, at 677.)

Due to the fact that the probabilities were that, but for Standard's actions, Deep Rock would have been in better financial condition this Court subordinated all of Standard's claims.

Due to the fact that the facts here show that undoubtedly, but for Columbia's activities, Inland would be in much better financial condition, the Columbia claims were properly subordinated, regardless of proof of specific damage. Certainly injury is apparent.

Furthermore, the numerous details set forth supra, pp. 3 to 18, show that Columbia's plan was a wrongful one and was one to destroy Inland. It succeeded.

CONCLUSION.

As the Courts below acted unanimously and in harmony with all similar Federal and State decisions in applying the unclean hands doctrine to a situation found crying for it, there is no reason for this Court to review what was done, and, therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF KENTUCKY.

In Bankruptcy No. 115 Lexington.

IN THE MATTER OF AMERICAN FUEL AND POWER COMPANY, ETC.,
Debtors.

In Bankruptcy No. 989-B Lexington.

IN THE MATTER OF INLAND GAS CORPORATION,
Debtor.

In Bankruptcy No. 991-B Lexington.

IN THE MATTER OF KENTUCKY FUEL GAS CORPORATION,
Debtor.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Filed Sept. 3, 1943. R. I, 590-603.)

These causes having been heard together and being submitted upon the several petitions filed herein seeking rejection of the claims asserted in these proceedings by Columbia Gas and Electric Corporation against the Debtors, American Fuel and Power Company, Inland Gas Corporation and Kentucky Fuel Gas Corporation, respectively, and the Court having heard and considered the evidence presented by the parties bearing upon the issues involved, specially finds the Facts and separately states its Conclusions of Law thereon, as follows, to-wit:

FINDINGS OF FACT.

1. The debtor, INLAND GAS CORPORATION (hereinafter called INLAND) was incorporated on March 31, 1927, for the purpose of engaging in the business of producing, transporting and selling natural gas to industrial consumers. The enterprise was entirely financed by the sale of its securities to the public, the proceeds from which, after the payment of large financing and promotional expenses, it used to acquire natural gas reserves in Eastern Kentucky and to construct a transmission line from its gas fields to Ashland, Kentucky. In 1927, it issued and sold its 7% First Mortgage Bonds in the principal amount of $1,000,000 and an issue of 7% cumulative preferred stock with an aggregate par value of $200,000. In 1928, it issued and sold its 6½% First Mortgage Sinking Fund Bonds, maturing February 1, 1938, in the principal amount of $4,400,000 and its 7% Ten Year Debentures in the principal amount of $1,500,000. These securities were underwritten and sold to the public by a group of investment bankers. From the net proceeds derived from the 1928 financing, the corporation retired the securities issued in 1927. The entire issue of its common stock consisting of 341,775 shares was acquired by the promoters and underwriters as compensation for services. The underwriters also received for their services from 10 to 12 percent of the proceeds derived from the securities. The net returns to the corporation were further depleted by other promotional expenses. In 1930 it sold to the American Fuel and Power Company its 6% Gold Notes in the principal amount of $400,000.

2. The debtor, KENTUCKY FUEL GAS CORPORATION (hereinafter called KENTUCKY FUEL) was incorporated on May 17, 1928, primarily for the purpose of supplementing the business of INLAND by the acquisition of certain natural gas producing property located in Eastern Kentucky, then owned by American Rolling Mill Company. The organization was promoted by the same persons who promoted INLAND and likewise was entirely financed by the sale of

securities to the public, consisting of 6½% First Mortgage Sinking Fund bonds maturing June 1, 1942, in the principal amount of $4,000,000 and 6½% Sinking Fund Debentures maturing June 1, 1938, in the principal amount of $1,000,000. These securities were marketed by some of the same group of bankers who financed INLAND and upon the same terms. The common stock of the company, apportioned among the promoters and underwriters, consisted of 500,000 shares. Out of the net proceeds derived from the sale of these securities the corporation paid $3,000,000 to the American Rolling Mill Company for its gas acreage.

3. The debtor, AMERICAN FUEL AND POWER COMPANY (hereinafter called AMERICAN FUEL) was organized in July 1928 by the same group who promoted INLAND and KENTUCKY FUEL for the purpose of taking over and holding the stock of these operating corporations and others planned to be organized, in order to integrate and expand their operations through unified control and management. The stockholders of INLAND and KENTUCKY FUEL exchanged their stock, share for share, for stock in this holding company. As of July 1, 1929, it issued and sold to the public 7% Convertible Gold Notes in the principal amount of $2,000,000 maturing July 1, 1934. It used the net proceeds derived from the sale of these notes to provide financial aid to INLAND and KENTUCKY FUEL, and to acquire additional natural gas acreage and transmission lines. It caused the organization of and financed additional subsidiary corporations for the purpose of having them acquire, hold and operate various properties, as follows, to-wit:

(a) Carbreath Gas Company, which acquired and held gas acreage in Southeastern Kentucky, together with gas gathering lines and equipment;

(b) Inland Gas Distributing Company, which constructed, held and operated a gas transmission line extending from Ashland, Kentucky, into Huntington, West Virginia, by means of which it transmitted nat-

ural gas purchased and received into its line from INLAND at Ashland, Kentucky, to industrial consumers in Huntington and Kenova, West Virginia and vicinity;

(c) Buckeye Fuel Company, which held leases upon gas producing acreage in Lawrence County, Ohio, from which it supplied gas to Buckeye Gas Service Company;

(d) Buckeye Gas Service Company, which owned gas distributing lines in Ironton and Coalgrove, Ohio, by which it sold and distributed to industrial consumers gas supplied by Buckeye Fuel Company and KENTUCKY FUEL, and

(e) Kentucky Drilling Company, which was principally utilized to carry on drilling operations.

As the parent corporation, AMERICAN FUEL, held all the capital stock of these subsidiaries, and with them, together with INLAND and KENTUCKY FUEL, made up the so-called "American Fuel System".

4. During the period covered by the events involved in this litigation, COLUMBIA GAS AND ELECTRIC CORPORATION (hereinafter called COLUMBIA), through its numerous owned and controlled subsidiary corporations, engaged in the production, transmission, distribution and sale of natural gas to both industrial and domestic consumers in Kentucky, West Virginia, Ohio, Indiana and other states. With its subsidiaries connected by interstate transmission lines and integrated through unified control of management and operation, it constituted a huge unitary interstate enterprise generally known as the "Columbia System".

5. COLUMBIA's subsidiaries, which were engaged in selling fuel gas, served both domestic and industrial consumers as public utilities, and hence were subject to the rules and regulations of State Public Utility Commissions as well as the provisions of municipal franchises under which they operated. The result was they could not contract with industries for continuous service or fixed rates over a

period of years by reason of the power of state and municipal authorities to change their rates from time to time and to require them to give preference to domestic consumers over industrial consumers when, by reason of cold weather or other conditions, the supply of natural gas was insufficient for both. Service to industries constituted a substantial part of their business.

6. The subsidiaries of AMERICAN FUEL served only industrial users under private agreements. All plans for expansion and development of the American Fuel System were projected upon a strict adherence to that policy. By so limiting operations, they were free from the handicap of municipal franchises and regulation by utility boards and commissions. Consequently they had a substantial competitive advantage over COLUMBIA's subsidiaries wherever, operating in the same territory, they came into competition with each other for the business of industrial consumers.

7. Prior to the organization of the American Fuel System, COLUMBIA enjoyed virtual freedom from actual or threatened competition of a serious nature in the fields occupied by its subsidiaries in the states of Kentucky, Ohio and West Virginia. During the years 1928, 1929 and until November 1930, AMERICAN FUEL and its subsidiaries engaged in actual competition in interstate commerce of a substantial nature with COLUMBIA and certain of its subsidiaries in the production, transmission and sale of natural gas to industrial consumers in the states of West Virginia, Kentucky and Ohio, and also in the acquisition of natural gas acreage in the gas fields of Eastern Kentucky. As a result of the competitive advantage enjoyed by AMERICAN FUEL it was able to and did take away from COLUMBIA the American Rolling Mill Company, the largest industrial customer of one of its subsidiaries in Kentucky, and many of the largest industrial customers of its subsidiary in Huntington, West Virginia, and vicinity. By the end of

1929, this competition had become so serious and threatening as to cause COLUMBIA to consider and inaugurate measures to combat it.

8. During 1929-30, COLUMBIA was engaged in the development of a plan for the construction of a pipe line for transmission of natural gas from its Kentucky-West Virginia fields to the eastern seaboard cities of Washington, Baltimore and Philadelphia (hereinafter referred to as The Seaboard Line). This project, as originally planned, called for a large increase in COLUMBIA's holdings of gas reserves in West Virginia and Eastern Kentucky and to that end COLUMBIA entered upon a large scale program for increasing its gas acreage in that territory. It considered that the gas acreage held by AMERICAN FUEL and its subsidiaries would be a desirable adjunct to its system.

9. Both INLAND and KENTUCKY FUEL sustained substantial operating losses in 1928 and 1929. Due to their heavy burden of securities and burdensome gas contracts entered into with Hamilton Gas Company and Piney Oil and Gas Company, INLAND, KENTUCKY FUEL and AMERICAN FUEL were never able to earn their fixed charges. COLUMBIA acquired knowledge of the precarious financial position of AMERICAN FUEL and its subsidiaries, and that the indentures securing the bonds of INLAND and KENTUCKY FUEL provided that after their failure to meet interest or sinking fund requirements, upon the request of the holders of 25 percent in principal amount of the bonds, the indenture trustees should declare defaults to have occurred and institute foreclosure proceedings. Anticipating such eventuality and in order to place itself in a position to force foreclosure and sale of the properties and afford it an opportunity to purchase them at a foreclosure sale, in January 1930, COLUMBIA began to purchase bonds of INLAND and KENTUCKY FUEL on the open market by methods which concealed the fact that it was the purchaser. By the end of April 1930, it had acquired in excess of 25 percent in principal amount of the bonds of both.

10. From the beginning of their operations, INLAND and KENTUCKY FUEL were under the supervision and management of Hope Engineering Company (hereinafter called "Hope"), an organization with wide experience in building natural gas transmission lines and successfully promoting natural gas enterprises. It recognized the dubious financial condition of AMERICAN FUEL and its subsidiaries and realized that its only hope of survival was to secure capital to bridge over its immediate difficulties and to finance a large expansion of its business. It considered the industrial area in and around the city of Detroit, Michigan, which was not then supplied with natural gas, an inviting field, and recommended to AMERICAN FUEL that an effort be made to enter this field. Plans to that end were promptly formulated. "Hope" succeeded in inducing American Utilities and General Corporation and Moody-Seagraves Company to join in the promotion of the project, as the result of which this group (hereinafter referred to as "The Syndicate") united their resources and combined their efforts in an ambitious plan to construct a natural gas transmission pipe line extending from the gas fields of Eastern Kentucky through the heart of the territory then occupied and served by the subsidiaries of COLUMBIA to the city of Detroit for sale and distribution of natural gas to industrial enterprises along the way, as well as in the Detroit industrial area. The American Utilities and General Corporation was a prosperous and successful investment trust backed and controlled by G. E. Barrett & Company, a strong banking organization which had financed many gas enterprises throughout the country. Moody-Seagraves Company was an organization which had successfully built and operated natural gas projects and enjoyed wide experience in the promotion of such enterprises. This Syndicate constituted a sufficient combination of financial strength and business experience to foreshadow success of the proposed plans and thereby prevent the impending financial collapse of the American Fuel System as anticipated by COLUMBIA.

The Syndicate acquired from Freeman, Smith & Camp Company voting trust certificates representing 450,000 shares of AMERICAN FUEL stock and AMERICAN FUEL notes in the principal amount of $60,000, for all of which it paid $154,000. It also acquired from AMERICAN FUEL 1,000,000 shares of its newly issued common stock for which it paid $500,000. These acquisitions gave the Syndicate, as owner of the majority of its outstanding stock, complete control of the American Fuel System. To prevent default in certain maturing obligations of AMERICAN FUEL, INLAND and KENTUCKY FUEL, "Hope" agreed to provide funds sufficient to meet their immediate sinking fund requirements. Operations of the Syndicate were carried on by and through corporations which it wholly owned and controlled, to-wit: Northern Gas Company, an Ohio corporation, Northern Industrial Gas Company, a New York corporation, Howe Oil and Gas Company, and Northern Gas Company, a Delaware corporation. Through one of its corporations, the Syndicate applied for a franchise to lay its gas pipe lines in the streets of the city of Detroit and entered upon a vigorous campaign to secure contracts from industrial consumers in the city of Detroit and vicinity, as well as in the territory through which the proposed gas line would be constructed. Through another of its corporations, it surveyed and acquired the right of way for its transmission line from the gas fields of Eastern Kentucky, including the necessary permits for river crossings, and started the work of laying pipes under the Ohio River. Through another of its corporations, Howe Oil and Gas Company, it started the acquisition of additional gas acreage in the Eastern Kentucky fields to supplement the holdings of the American Fuel System.

The Syndicate planned to provide the money necessary to advance the project to a point where its successful completion and profitable operation could be demonstrated and then sell to the public a bond issue sufficient to finance completion. Contracts for the sale of natural gas were

secured from industrial consumers not only in the Detroit area but in the territory adjacent to the proposed line. Ralph K. Davis, a nationally known and highly reputable natural gas engineer, was employed to investigate and analyze the proposed enterprise and, after making an exhaustive survey of it in its entirety, he reported: "* * * the gas reserves are sufficient, the industrial market is adequate and * * * this project as a whole is a sound business proposition, which will be profitable to the gas company as well as an economic advantage to the industries of Toledo and Detroit."

11. During the time the plans of the Syndicate were maturing, COLUMBIA was also making plans to supply natural gas from its Kentucky and West Virginia fields to the Detroit area. It made a survey of the market in Detroit and, while the application of the Syndicate for a franchise in Detroit was pending, the Executive Committee of COLUMBIA passed a resolution providing for an extension of its existing gas transmission lines from Toledo to Detroit.

12. The plans, which COLUMBIA contemplated for the development of its business in the Detroit field and for the maintenance of its subsisting monopolistic position in fields occupied by its subsidiaries, were not only seriously threatened by the plans of the Syndicate for the development of the American Fuel System, but also by the starting of a large pipe line for the transmission of natural gas from the gas fields of the Texas Panhandle and the Hugoton Gas fields of Kansas which was proposed to be extended into the states of Ohio, Michigan and Indiana and make natural gas available from these sources not only to cities in Indiana and Ohio, which were then supplied by COLUMBIA, but also to the city of Detroit toward which COLUMBIA was looking and planning. Furthermore, United Carbon Company, a corporation which owned gas acreage in Eastern Kentucky, had announced its intention to build a natural gas pipe line from its fields to the city of Cincinnati, Ohio,

for the purpose of supplying gas to that city in competition with COLUMBIA and had proposed to furnish natural gas to a number of COLUMBIA'S customers in the Cincinnati area at a substantially reduced rate. The threat of competition by United Carbon Coompany in the Cincinnati area was averted by COLUMBIA arranging for its subsidiary, Warfield Natural Gas Company, to buy all the gas controlled by United Carbon Company. It met the formidable threat of serious competition from the Texas and Hugoton gas fields of the Southwest by using one of its subsidiaries, Columbia Oil and Gasoline Corporation, to purchase complete control of that project entailing an investment of more than $30,000,000. It continued its efforts to covertly gain a commanding position in the financial structure of the American Fuel System until it acquired approximately 42% of the outstanding bonds and debentures of KENTUCKY FUEL and approximately 36% of the outstanding bonds and debentures of INLAND, representing an aggregate expenditure of between three and four million dollars.

13. On October 30, 1930, COLUMBIA entered into a written contract with the Syndicate (which was consummated on November 6, 1930), under the terms of which, for the consideration of $2,826,789.28, it purchased the Syndicate's entire holdings in the American Fuel System and all other corporations which had been organized by the Syndicate for the promotion and development of its Detroit project consisting of 76% of the outstanding common stock of AMERICAN FUEL and all of the outstanding stock of Howe Oil and Gas Company, Bridge Gas Company, Northern Gas Company (Ohio), Northern Gas Company (Delaware) and Northern Industrial Company, together with all claims and securities held by the members of the Syndicate against AMERICAN FUEL and its subsidiaries. The price paid by COLUMBIA represented the total amount invested by the Syndicate and a clear profit of $350,000. Under the terms of the contract and in consideration thereof, COLUMBIA guaranteed to employ "Hope" to perform natural gas engineering

work on at least $20,000,000 of construction projects within a period of three years, for which it agreed to pay "Hope" a compensation of 4%, an obligation which it later discharged by paying "Hope" $400,000, without any work being done by "Hope". Also under the terms of the contract, the Syndicate delivered resignations of all officers and directors of AMERICAN FUEL and its subsidiaries and the other associated corporations, the stock control of which was acquired by COLUMBIA under the contract, and they were replaced by persons designated by COLUMBIA. Nominees of COLUMBIA were made voting trustees of the majority of the capital stock of KENTUCKY FUEL under a subsisting voting trust agreement. COLUMBIA agreed to hold the members of the Syndicate harmless by reason of the obligation of "Hope" to provide funds to meet sinking fund requirements of INLAND and KENTUCKY FUEL and in respect to any obligations imposed by gas sales contracts entered into with industrial customers in Detroit and elsewhere and from obligations imposed under leases entered into by Howe Oil and Gas Company for gas acreage. It also agreed to hold the Syndicate harmless as to the obligations under INLAND'S gas purchase contracts with Hamilton Gas Company and Piney Oil and Gas Company. By the use of certain claims thus acquired COLUMBIA promptly precipitated receivership proceedings against INLAND and KENTUCKY FUEL which resulted in having them placed in the hands of COLUMBIA'S nominee, W. E. Lockhart, as receiver. This resulted in immediate discontinuance of all efforts to promote the Detroit project, and in curtailment of further extension of the subsisting competition between the subsidiaries of COLUMBIA and AMERICAN FUEL.

14. Negotiations, pursuant to which COLUMBIA acquired from the Syndicate control of the American Fuel System, were inaugurated by O. R. Seagraves, President of Moody-Seagraves Company, whose confidence in the ability of the Syndicate to successfully carry out its plans for the Detroit project had been considerably shaken by reason of the

financial depression throughout the country and the depleted financial strength of the members of the Syndicate by reason thereof. The other members of the Syndicate did not fully share the views of Mr. Seagraves and the principal inducements leading them to agree to the deal with COLUMBIA were the large profits realized from it by them. A collateral inducement to Mr. Seagraves was the prospect of his making a profitable contract with Columbia to take gas from fields located in the Southwest in which he was interested.

15. Prior to the sale of its holdings to COLUMBIA under the contract of October 30, 1930, although the Syndicate was encountering unexpected obstacles and difficulties in the promotion of its plans for the Detroit project, it had not abandoned them and they constituted a sufficient menace and threat to COLUMBIA to induce COLUMBIA to make the deal highly profitable to members of the Syndicate. But for the consummation of this transaction, the Syndicate was ready, able and willing to continue its efforts to develop the project. Whether it would have ultimately succeeded is a matter which lies entirely in the realm of speculation.

16. Prior to COLUMBIA's acquisition of domination and control of the American Fuel System in the manner hereinbefore stated, it had asserted through certain of its responsible executive officers, in substance and effect, that it would not lie idly by and permit the construction of a pipe line through the heart of its territory as proposed by the Syndicate.

17. On and prior to January 1, 1930, and continuing throughout the year 1930 and thereafter, COLUMBIA, together with its executive officers, directors and certain of its corporate subsidiaries, was engaged in a conspiracy, the object, purpose and effect of which was to restrain and monopolize trade and commerce in natural gas in and between the states of Kentucky, Ohio, West Virginia, Indiana

and Michigan, and the claims herein presented and asserted by and on behalf of COLUMBIA against the debtors, AMERICAN FUEL, INLAND and KENTUCKY FUEL, were acquired pursuant to and in accomplishment of the aims and purposes of that conspiracy. Any plans to acquire and utilize the properties of the American Fuel System as a legitimate adjunct to the Columbia System were merely collateral and indicidental to the main purpose of the conspiracy to restrain actual and potential interstate competition in the production, transportation, distribution and sale of natural gas.

CONCLUSIONS OF LAW.

1. The Court has jurisdiction of the parties and the subject matter of this proceeding, and in the exercise of its discretion was empowered to authorize and permit intervention herein by the United States.

2. A conspiracy to violate the Anti-trust Laws of the United States may be established by circumstantial evidence if the circumstances disclosed point unerringly to the existence of such conspiracy and can be satisfactorily explained upon no other reasonable hypothesis. The facts and circumstances disclosed in this case are sufficient, under this test, to warrant the finding of conspiracy as stated in paragraph No. 17 of the Findings of Fact.

3. The conspiracy, pursuant to which COLUMBIA acquired the claims herein asserted against the debtor, as found and described in paragraph No. 17 of the Findings of Fact was in violation of the Anti-trust Laws of the United States, to-wit: The Sherman Act and The Clayton Act.

4. The following conclusions of Law stated by the Circuit Court of Appeals of the Sixth Circuit in its opinion, In re American Fuel and Power Company, 122 F. (2d) 223, are here applicable and controlling, to-wit:

(a) "It is the duty of the Bankruptcy Court in reorganization proceedings to withhold its aid from

parties seeking to obtain a benefit from an agreement tinged with illegality".

(b) "* * * the courts will not lend their assistance in any way toward carrying out the terms of a contract the inherent purpose of which is to violate the law and they likewise will refuse to enforce any right directly springing from such a contract, although such right be legal."

(c) "Equity will not permit one to rely on his wrongful act as against those affected by it, but not participating therein, to support his own asserted legal title."

(d) "The claim of a creditor or the interest of a stockholder which is invalid because it is based on or arises out of an illegal or criminal transaction, is not provable or allowable in bankruptcy reorganizations."

(e) "Under the facts in this record no principle of equity, morals or law requires the court to approve the present claims or stock interests of the Columbia and this court should not lend its aid to further a scheme abhorrent to all recognized rules of right and justice as the facts here show."

5. Judgment should be entered rejecting all claims asserted herein by COLUMBIA against the debtors and adjudging that COLUMBIA take nothing thereby.

/s/ H. CHUBCH FORD,
Judge.

September 3, 1943

APPENDIX B

Statement of the Number of Columbia System Former Customers Obtained by Inland Gas Corporation, Inland Gas Distributing Company, Buckeye Gas Service Company and Kentucky Fuel Gas Corporation, and Annual MCF Sales to These Customers

		Period in which obtained													
	From organization to 1/1/30	1/1/30 to 11/6/30, incl.	11/7/30 to 12/1/30, incl.	12/2/30 to 12/31/30, incl.	1931	1932	1933	1934	1935	1936	1937	1938	1939	1940	1941
Number of former Columbia customers obtained	38	4	.....	.....	.....	.....	3	4	1	2	1	4	.....	1	.....
Annual consumption (MCF):															
Prior to 1930	5,926,787	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1930	2,336,833	63,425	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1931	2,153,798	72,004	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1932	1,824,015	39,448	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1933	2,495,166	24,486	.....	.....	.....	.....	2,298	.....	.....	.....	.....	.....	.....	.....	.....
1934	2,837,731	56,712	.....	.....	.....	.....	5,972	20,965	.....	.....	.....	.....	.....	.....	.....
1935	3,668,815	75,097	.....	.....	.....	.....	4,791	14,901	164	.....	.....	.....	.....	.....	.....
1936	3,859,509	144,447	.....	.....	.....	.....	8,476	17,768	950	1,965	.....	.....	.....	.....	.....
1937	3,246,037	135,915	.....	.....	.....	.....	7,358	18,599	882	5,850	132	.....	.....	.....	.....
1938	1,831,400	69,007	.....	.....	.....	.....	7,428	8,012	730	5,066	1,086	5,014	.....	.....	.....
1939	2,647,331	87,657	.....	.....	.....	.....	3,859	9,897	502	5,552	988	18,932	.....	.....	.....
1940	2,641,620	117,990	.....	.....	.....	.....	4,128	8,012	725	5,977	1,423	21,514	.....	1,026	.....
1941	3,145,103	133,801	.....	.....	.....	.....	3,678	4,195	332	5,635	.....	18,154	.....	6,043	.....

NOTE.—Includes American Rolling Mill Company.